[redacted]

(31,844)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 339

J. SMYLIE HERKNESS, APPELLANT,

vs.

VALENTINE K. IRION, COMMISSIONER OF CONSERVATION OF THE STATE OF LOUISIANA, AND PERCY SAINT, ATTORNEY GENERAL OF THE STATE OF LOUISIANA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

INDEX

	Original	Print
Record from the district court of the United States, eastern district of Louisiana	1	1
Caption (omitted in printing)	1	
Bill of complaint	2	1
Exhibit "A"—Application for permit to erect carbon plant, Monroe, La	14	13
Exhibit "B"—Letter from V. K. Irion to Hart, H. Russell, November 23, 1925	15	14
Exhibit "C"—Letter from Percy Saint to V. K. Irion, November 13, 1925	16	14
Order to show cause and allowing applic'n for restraining order	18	16
Bond on restraining order (omitted in printing)	21	
Answer	22	18

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INDEX

	Original	Print
Affidavit of J. Smylie Herkness	29	24
Exhibit—Act of sale from United Carbon Co. to J. Smylie Herkness, June 18, 1925	31	26
Argument and submission (omitted in printing)	37	
Stipulation re hearing	38	30
Opinion, Burns, J.	39	31
Decree	48	37
Petition for appeal	49	38
Assignments of error	53	41
Order allowing appeal	57	44
Bond on appeal (omitted in printing)	59	
Praecipe for transcript of record	61	46
Clerk's certificate (omitted in printing)	63	
Citations and services (omitted in printing)	64	
Statement of points to be relied upon and designation to appellant to print the entire record with affidavit of service	66	48

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

No. 18272. In Equity

J. Smylie Herkness, Complainant,

v.

Valentine K. Irion et al., Defendants

Bill of Complaint—Filed December 17, 1925

To the Honorable the Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division:

J. Smylie Herkness, a citizen of the State of Pennsylvania, and a resident and inhabitant of the County of Montgomery, State of Pennsylvania, brings this, his bill, against Valentine K. Irion, a citizen of the State of Louisiana, and a resident and inhabitant of the Parish of Orleans, in the Eastern District of Louisiana, and against Percy Saint, a citizen of the State of Louisiana, and a resident and inhabitant of the Parish of St. Mary, State of Louisiana, in the Eastern District of Louisiana, and for cause of complaint against said defendants says:

I

Complainant is a citizen of the State of Pennsylvania and is a resident and inhabitant of the County of Montgomery, State of Pennsylvania.

II

Valentine K. Irion is a citizen of the State of Louisiana and is a resident and inhabitant of the Parish of Orleans, State of Louisiana. Said Valentine K. Irion now holds the office of Commissioner of Conservation of the State of Louisiana, which office was created by Act 127 of 1912 of the Legislature of Louisiana, as amended by subsequent

Acts and particularly by Act 105 of 1918, and also by the Constitution of Louisiana of 1921 and especially by Section [fol. 3] 1 of Article 5 and Section 1 of Article 6 thereof.

III

Percy Saint is a citizen of the State of Louisiana, and is a resident and inhabitant of the Parish of St. Mary, State of Louisiana. Said Percy Saint now holds the office of Attorney General of the State of Louisiana, which office was created by the Constitution of Louisiana of 1921, and especially by Section 55 of Article 7 thereof.

IV

Complainant is the owner in fee simple of eighty (80) acres of land situated in the Parish of Morehouse, State of Louisiana, being more particularly described as the S. ½ of the S. E. ¼ of Section 18, Township 20, North Range 5 East Louisiana Meridian, and of the gas in and under seven hundred and sixty (760) acres of land situated in the Parish of Ouachita and the Parish of Morehouse, in the State of Louisiana, more particularly described as the W. ½ of the S. E. ¼, S. E. ¼ of S. W. ¼, N. ½ of the S. W. ¼ and N. W. ¼ of Section 17, and the N. ½ of N. E. ¼, S. E. ¼ of N. E. ¼, N. ½ of S. E. ¼, S. E. ¼ of S. W. ¼ and N. ½ of S. W. ¼ of Section 18 and the S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼ of Section 20, all in Township 20, North Range 5 East, Louisiana Meridian, together with the exclusive rights to mine and drill said lands for the purpose of producing natural gas. All of the lands above described are contiguous and adjacent to the tract owned by complainant in fee simple.

V

Complainant is the owner of two natural gas wells; one being situated and being on the tract of land above described as owned by complainant in fee simple and the other being situated on the seven hundred and sixty acres above described. Both of said wells were drilled under permits issued by the Department of Conservation of the State of Louisiana and drilling thereof has been completed. Said wells are numbered 130 and 131 on the official map of the Department of Conservation of the State of Louisiana.

VI

Complainant purchased the land owned by him in fee simple as aforesaid and the gas wells and gas rights herein- [fol. 4] above described with a view to erecting on the property owned by him in fee simple a plant for the manufacture of carbon black from the natural gas produced from the two wells aforesaid and from such other wells as might be hereafter drilled on said land, and a plant for the manufacture of ink from carbon black so produced; and complainant is about to expend for that purpose a sum considerably in excess of One Hundred Thousand ($100,000) Dollars for the construction of his plant. Complainant purchased said land, gas rights and wells in the month of June, 1925, and paid therefor the sum of Two Hundred and Twelve Thousand ($212,000.00) Dollars in cash. Said property is without any substantial value except for the purpose of producing natural gas and manufacturing it into carbon black.

VII

The Legislature of the State of Louisiana has not prohibited the use of natural gas for the making of carbon black but, on the contrary, by the provisions of Act 91 of the Legislature of Louisiana, for the year 1922, has expressly provided "that natural gas may be used in the manufacture of barbon black, under the conditions as fixed and imposed by the provisions of this Act;" and the Legislature of the State of Louisiana has furthermore prescribed minute rules and regulations governing the use of natural gas for manufacturing into carbon black by the provisions of Acts 91 of 1922, and 252 of 1924, of the Legislature of Louisiana.

VIII

The Commissioner of Conservation of the State of Louisiana has no authority or power except to make rules and regulations necessary to carry out the provisions of said Acts, and not in conflict therewith, and to enforce such rules and regulations and the provisions of said Acts.

IX

It has been the custom and practice of the Department of Conservation to require persons about to engage in the

manufacture of carbon black to make written application to it for a permit on a form furnished by the Department of Conservation and heretofore said Department of Con- [fol. 5] servation has issued said permits as a matter of course.

In pursuance of the custom and practice aforesaid, complainant, on the 29th day of October, 1925, filed with the Department of Conservation an application for a permit to erect a factory for the manufacture of carbon black, a copy of said application being annexed hereto and made a part hereof and marked "Exhibit A." Said application was on the form furnished by the Department of Conservation and contained all of the information sought by the Department.

X

That on November 23, 1925, the defendant, Valentine K. Irion, acting as Commissioner of Conservation, refused to issue a permit to complainant on the sole ground that the Department of Conservation would not permit the erection or operation of any plants for the manufacture of carbon black from natural gas, other than those plants already in operation in the State of Louisiana for that purpose. Complainant annexes hereto and makes a part hereof a copy of the letter of November 23, 1925, from the defendant, Valentine K. Irion, to Harry H. Russell, Attorney for complainant, refusing to grant complainant a permit and stating the reason for his refusal, marked "Exhibit B."

XI

That the action of said Valentine K. Irion was taken in pursuance of an opinion rendered him by the defendant, Percy Saint, in his capacity as Attorney General of the State of Louisiana. Complainant annexes hereto and makes part hereof a copy of the opinion of the Attorney General, of date November 13th, 1925, marked "Exhibit C."

XII

Complainant avers that he is, and has been, willing and ready at all times to observe and comply with the laws enacted by the Legislature of the State of Louisiana relative to the use of natural gas and its manufacture into carbon

black and such rules and regulations as have been, or may be, validly adopted by the Department of Conservation under the authority granted to it and not in conflict with the provisions of said laws; and that his application for a [fol. 6] permit was not refused on the ground of any failure on his part to observe said laws or said rules and regulations, or of any anticipation that he would fail to observe the same, but solely on the ground that no permits whatsoever for the manufacture of natural gas into carbon black would be issued to persons who were not already engaged in that industry in the State of Louisiana.

XIII

Complainant alleges that defendant, Valentine K. Irion, acting under the advice of defendant, Percy Saint, has adopted and publicly announced as a fixed rule of the Department of Conservation that he will refuse to permit any person not now actually engaged in the manufacture of natural gas into carbon black to engage in such business and that he will vigorously prosecute any and all persons who attempt to manufacture natural gas into carbon black without a permit from the Department of Conservation of the State of Louisiana; and that said defendant, Percy Saint, is prepared to and will lend his assistance to said defendant, Valentine K. Irion, in enforcing the rule aforesaid by instituting criminal proceedings against any person engaged in the business of manufacturing natural gas into carbon black without permit to do so from the Department of Conservation of the State of Louisiana.

XIV

That there are a number of persons now engaged, and who have been engaged for many years, with the permission and sanction of the Department of Conservation, in the manufacture of natural gas into carbon black and that the necessary effect of the rule adopted by the defendant, Valentine K. Irion, as Commissioner of Conservation, in pursuance of the opinion of the defendant, Percy Saint, as Attorney General of the State of Louisiana, and applied by said Valentine K. Irion in refusing to grant a permit to complainant and in attempting to deny to complainant

the right to manufacture natural gas into carbon black is to create a monopoly for the manufacture of natural gas into carbon black in favor of those persons now engaged therein and to prohibit and preclude all other persons from hereafter engaging in the manufacture of natural gas into carbon black within the State of Louisiana.

[fol. 7]

XV

Complainant alleges that the defendant, Valentine K. Irion, and the defendant, Percy Saint, have decided and determined not to permit complainant to erect his plant on the property aforesaid or operate same for the manufacture of natural gas into carbon black and that said Irion has so advised complainant; and that said defendants, unless enjoined by this Honorable Court, will attempt to prevent the erection and operation of said plant by complainant and will institute numerous criminal proceedings seeking to impose heavy fines and penalties upon complainant for erecting or operating his plant.

XVI

Complainant alleges that the Legislature of Louisiana has provided in Section 8 of Act 252 of 1924, as follows:

"That any person, partnership, firm, corporation or association of persons, wilfully violating any of the provisions of this Act, or any rule, regulation or order of the Commissioner of Conservation prescribed and promulgated by authority of this Act, which rules, regulations and orders are hereby declared to have the force and effect of statutory law, shall be guilty of a misdemeanor, and on conviction thereof shall be punished for the first offense by a fine of not less than one hundred ($100.00) dollars, and not more than one thousand ($1,000.00) dollars, and for the second offense not less than one hundred ($100.00) dollars, nor more than five thousand ($5,000.00) dollars, and for the third offense not less than one hundred ($100.00) dollars, nor more than ten thousand ($10,000.00) dollars, in the discretion of the Court, and each and every day on which any person, partnership, or association of persons shall violate any of the provisions of this Act, or any such rule, regula-

tion or order of the Commissioner of Conservation, except as provided in Section No. 4 hereof, shall constitute a separate offense hereunder and subject the offender to the penalty herein provided; and three convictions within a period of two years for violating any of the provisions of this Act, or any such rule, regulation or order of the Commissioner of Conservation, where the violations are wilful and where the second violation succeeds a prior conviction, and the third violation succeeds the second conviction, shall subject the offender in the discretion of the court to the forfeiture of the right to do the business in the State that such offender is engaged in, or carrying on, and wherein such convictions were had, at the suit of the Commissioner of Conservation before a court having jurisdiction at the place where such offenses were committed."

Complainant further alleges that by Section 9 of said Act 252 of 1924, it is made the duty of the Attorney General to represent the Commissioner of Conservation in the enforcement of all of the provisions of said Act and of the orders, rules and regulations made, adopted and promulgated by [fol. 8] said Commissioner of Conservation by authority of said Act and that the District Attorneys throughout the State are under the supervision of, and subject to the orders of the Attorney General of Louisiana with reference to the institution of criminal proceedings on behalf of the State or its Departments.

XVII

Complainant alleges that he has a lawful property right in and to the land owned by him in fee simple, hereinabove described, and in and to the two gas wells hereinabove described, and in and to the gas rights hereinabove described, and has also the right of the free use and enjoyment thereof, subject only to such restrictions as might be reasonably and lawfully imposed upon him in common with all other persons, by the Legislature of Louisiana, with regard to the extraction of natural gas and with regard to the use thereof; that the Legislature of the State of Louisiana has not confined, or attempted to confine, the production of natural gas and the manufacture thereof into carbon black, to persons who are now engaged in such production and

such manufacture; that the action of the defendant, Valentine K. Irion, acting in conjunction with and under the advice of the defendant, Percy Saint, in attempting to prohibit complainant, and all persons other than those now engaged in the production of natural gas and in the manufacture thereof into carbon black from producing such gas or manufacturing same into carbon black is illegal and without authority, and contrary to the laws of the State of Louisiana.

XVIII

That if the laws of the State of Louisiana are to be construed as authorizing the defendant, Valentine K. Irion, to prohibit the production of natural gas and its manufacture into carbon black, save in the case of such persons as are now engaged therein, or as delegating to said Irion the right to prohibit such production and manufacture, except by persons to whom he may choose to issue permits, then such laws are in violation of the provisions of Section 1 and 2 of Article 2 of the Constitution of Louisiana of 1921, dividing the powers of Government and prohibiting the exercise of legislative power by the Executive Department, and of Section 1 of Article 6 of said Constitution providing [fol. 9] for the protection by the Legislature of the natural resources of Louisiana, and of the provisions of Section 2 of Article 1 of said Constitution, prohibiting the deprivation of property, except by due process of law, and of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting any State from depriving any person of property without due process of law, or denying to any person the equal protection of the law.

XIX

Complainant alleges that the Department of Conservation is now, and has been for several years, permitting other persons to withdraw natural gas from the lands owned or leased by them and adjacent to the above described lands of complainant and to the two gas wells hereinabove described and that the effect thereof will be the withdrawal of the natural gas from the common reservoir under plaintiff's lands and the lands of such persons, so

that in the course of time no natural gas will be left beneath plaintiff's lands and the two gas wells hereinabove described will be of no value; and that every day that complainant is delayed in exercising his right to produce natural gas from said wells and to manufacture same into carbon black will result in the diminution of the common reservoir from which said natural gas is drawn.

XX

Complainant alleges that the Monroe gas field, wherein your complainant's property is situated, is the most important source of supply of carbon black for the manufacture of news inks in the United States and that your complainant desires to construct a plant for the manufacture of carbon black, for the purpose of selling carbon black to the Chas. Enou Johnson Co., a company engaged in the manufacture of news inks and a company which has been engaged in the manufacture of news inks for over 120 years. That the refusal to grant your complainant a permit to manufacture carbon black will in no way conserve the supply of natural gas used for the purpose of making carbon black in the State of Louisiana, because if the said company is unable to buy carbon black from the plant about to be erected by your complainant, it will be compelled to [fol. 10] buy carbon black from the produce of other gas wells in the Monroe field, as it has been purchasing such carbon black ever since carbon black was manufactured in the said field, and the only effect of the refusal to permit the complainant to proceed with the manufacture of carbon black would be to invest in the combination of carbon black manufacturers now in the field, which said combination was effected within the last year, practically an absolute monopoly in respect to carbon black and an unrestricted power to advance the price thereof, at the pleasure of the combination, and your complainant avers that since the formation of the combination of carbon black manufacturers, hereinabove referred to, the price of carbon black has been increased sixty per cent. or from 5 to 8 cents a pound. Your complainant avers, on information and belief, that there is an agreement between the combination of carbon black manufacturers and the defendant, Valentine K. Irion,

or someone connected with or formerly connected with the office of the said Valentine K. Irion, that the total amount of gas used in the production of carbon black shall not exceed an amount fixed in the said agreement, and that the distribution of the said amount is left to the carbon black manufacturers. The details of this said agreement are not definitely known to your complainant but he has been informed and therefore avers that the effect of this agreement is that the defendant, Valentine K. Irion, will refuse to permit anyone not a party to the agreement to use any gas for the production of carbon black without the consent of the parties to the agreement, and the defendant, the said Valentine K. Irion, has stated that under no circumstances will he permit the erection of any new plants for the production of carbon black. The complainant therefore avers that the action of the defendant, the said Valentine K. Irion, and the execution of the hereinbefore mentioned agreement, is illegal and has resulted in the creation of an illegal and unlawful monopoly.

XXI

Complainant alleges that the plant to be erected by him on the property aforesaid would be absolutely worthless for any other purpose than the manufacture of natural gas into carbon black and that if it is determined after the erec- [fol. 11] tion of said plant that it cannot be used by complainant for such purpose, then the amount expended therefor, which will be in excess of One Hundred Thousand ($100,000) Dollars will be totally lost to complainant.

XXII

That complainant has begun to erect his plant on the property aforesaid and intends to proceed rapidly therewith.

XXIII

That the loss, damage and inconvenience to complainant through the threatened and imminent action of said defendants, Valentine K. Irion and Percy Saint, in interfering with and attempting to prevent the erection by complainant of his plant and the use thereof by him for the

purpose of manufacturing natural gas into carbon black and in instituting proceedings, criminal and otherwise, to inflict fines and penalties upon complainant for such use of his property would cause complainant irreparable damage and injury; and the threatened action of said Saint and of said Irion is without right or color of law and is designed to interfere with and destroy the property rights of petitioner; that complainant has no adequate remedy at law and a writ of injunction is necessary to protect complainant in the premises.

XXIV

Complainant shows that this cause is a suit in equity of a civil nature and that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Five Thousand Dollars ($5,000), and that this cause is one arising under the Constitution and laws of the United States; to wit; Section One of Article 14 of the Amendment to the Constitution to the United States and that in this cause and suit there is a controversy between citizens of different States.

Wherefore, the premises considered, complainant prays for relief, as follows:

(1) That, after due proceedings had, the said Valentine K. Irion and the said Percy Saint, be perpetually enjoined and restrained from interfering or attempting to interfere with the erection by complainant of a factory on the land [fol. 12] described in this bill for the manufacture of natural gas into carbon black, or with the operation of such factory for the manufacture of carbon black, or with the production of natural gas by complainant from the two gas wells described in this bill, or with the manufacture thereof into carbon black.

(2) That, after due proceedings had, said Valentine K. Irion and Percy Saint be perpetually enjoined and restrained from inflicting or imposing, or attempting to inflict, impose or collect any fine or penalty against complainant for the erection by him of a factory on the land described in this bill for the manufacture of carbon black, or for the operation thereof, or for the production of natural gas from the gas wells described in this bill and its

manufacture into carbon black; and particularly that said Valentine K. Irion and Percy Saint be perpetually enjoined and restrained from ordering, requesting or instituting any suit, either criminal or civil in its nature, against complainant to interfere with the construction, operation or use of his factory on the land aforesaid in the manufacture of carbon black from the gas from the wells aforesaid or to punish complainant by the infliction of fines or penalties for erecting said factory or operating same or producing the natural gas from said wells and manufacturing same into carbon black.

(3) That, pending the final hearing of this cause, and after notice and hearing at such time and place as this Honorable Court may designate, an injunction pendente lite may issue against the defendants, enjoining and restraining them as aforesaid.

(4) That a temporary restraining order issue forthwith against the defendants enjoining and restraining them as aforesaid pending the hearing and determination of complainant's application for a preliminary writ of injunction.

(5) That subpœnas in the manner and form, and in accordance with the rules and practice of this Court, be served upon said Valentine K. Irion and said Percy Saint, commanding them, and each of them, in accordance with the rules and practice of this Honorable Court, to appear [fol. 13] herein and true and perfect answer make to this petition, but not under oath (answer under oath being hereby expressly waived) and to stand and abide by the order and decree of this Court in the premises; that the Court may designate a time and place for the hearing of the above prayed for injunction pendente lite, and that due notice thereof be given to all the defendants and to Henry L. Pugua, Governor, and to Percy Saint, Attorney General of the State of Louisiana, in accordance with law and the practice of this Court; that complainant may have such other and further or different relief as equity and the nature of the case require, and all costs in the premises unjustly sustained.

(Sgd.) Saul, Ewing, Remick & Saul, Harry H. Russell, Spencer, Gidiere, Phelps & Dunbar, Solicitors for Complainant.

Duly sworn to by J. Smylie Herkness. Jurat omitted in printing.

[fol. 14] EXHIBIT "A" TO BILL OF COMPLAINT

Copy

Department of Conservation, Division of Minerals

Application for Permit to Erect Carbon Plant, Monroe, La.

1. Three copies of this application must be accompanied by blue prints or plans showing ground plan of proposed plant.

2. The following data must be furnished:

1. Name of Applicant: J. Smylie Herkness.
2. Address: Rydal, Penna.
3. Name of Louisiana Representative: Harry H. Russel.
4. Address: Monroe, Louisiana.
5. Number of men to be employed: 6.
6. Location of Plant (give part of section, township, & range): S. ½ of S. E. ¼, Sec. 18 N., R. 5 E.
7. Number of Wells: 2.
8. Number of Burning Houses: 32.
9. Number of burners per houses: 2,380.
10. Total Number of Burners: 75,160.
11. Cubic feet of gas to be used: 5,000,000 daily.
12. Approximate output of carbon, 5,500 pounds daily.
13. From what wells: 130 and 131.
14. By whom owned: J. Smylie Herkness.
15. Open Flow Capacity of same: 14,859,680 cu. ft. and 8,988,520 cu. fut.
16. Wet or dry gas: Wet.

Remarks (here give any features of construction which are not generally used): Carbon plant of one unit with gasoline extraction plant.

J. Smylie Herkness.

Witness: James S. Hagan.

[fol. 15] EXHIBIT "B" TO BILL OF COMPLAINT

Copy

State of Louisiana

November 23, 1925.

Mr. Harry H. Russell, Monroe, La.

DEAR MR. RUSSELL: I have your favor of the 12th instant relative to the application filed by you on behalf of J. Smylie Herkness to build and operate a carbon black plant in Sec. 18, T. 20, No. R. 5 East, Morehouse Parish, Louisiana.

In accordance with our conversation on the subject some time ago, I submitted the matter to the Attorney General for an opinion as to my powers and authority in the premises. I am enclosing you a copy of his reply, upon the strength of which your application is hereby respectfully denied.

It has been the policy of this department to curtail rather than increase the consumption of natural gas for the purposes mentioned. It would, therefore, be folly for me to sanction the erection of additional plants under such circumstance.

Very truly yours, (Sgd.) V. K. Irion, Commissioner.

[fol. 16] EXHIBIT "C" TO BILL OF COMPLAINT

Copy

State of Louisiana

November 13, 1925.

Dr. V. K. Irion, Commissioner, Department of Conservation, New Orelans, La.

DEAR DR. IRION: Your letter of the 5th inst. enclosing correspondence and blue print referring to the application of J. Smylie Herkness of Rydel, Penn. for the permit to erect a carbon plant in the Monroe gas field is to hand. I not. that you ask whether or not Mr. Herkness is en-

titled to a permit under the facts and conditions set out in a letter from his attorney and a statement contained in your letter from Mr. Orin M. Grisham.

As I understand the facts, Mr. Herkness bought certain gas property from the Magnolia Carbon Company; that two permits had been granted to the Magnolia Carbon Company prior to the sale to Herkness but the year having expired in each Mr. Herkness now applies for a permit for his company.

Under the provision of Act 250 of 1920, the Conservation Department has full power of administration and regulation of the natural gas resources, and has the power to issue or to refuse to issue permits to burn gas for carbon black plants. All permits are given in an express limit of one year unless sooner revoked for and accepted with full recognition of the powers of the Department of Conservation, which powers authorize your department to refuse to grant a permit or to refuse to renew any permit already granted it is also granted with the understanding and knowledge that the permit is not transferrable.

It is the opinion of this Department that the Department of Conservation is vested with full power and authority to refuse the permit sought by Mr. Herkness. Burning gas to make carbon black is a recognized waste of gas and the only reason that the Department of Conservation granted any permit to use gas in the manufacture of carbon black was that the time the carbon black [fol. 17] was permitted in Louisiana there seemed to have been a limited market for gas to be used in other ways. If your department does not have the power and authority to refuse permits to burn gas in the manufacture of carbon black, it would mean that your department has little authority to conserve natural gas resources of the State; it would also mean that you have very little authority to regulate the output of natural gas. Under those conditions, I am of the opinion that you have full power to decline any further permits to burn gas in the manufacture of carbon black.

Very truly yours, (Sgd.) Percy Saint, Attorney General.

PS:s.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE AND ALLOWING APPLICATION FOR RESTRAINING ORDER—December 17, 1925

Whereas in the above named cause, it has been made to appear in the bill of complaint filed herein that a writ of injunction preliminary to the final hearing is proper, and that prima facie the complainant is entitled thereto, injoining the defendants from the acts complained of and about to be committed.

And it appearing to the Court that this is a case arising under Section 266 of the Judicial Code and that the application for a preliminary injunction should be heard before three judges;

It is ordered that the defendants appear before the Judge of this District Court of the United States for the Eastern District of Louisiana, and a Judge of the Circuit Court of the United States for the Fifth Circuit, and another District or Circuit Judge of the United States Court, sitting to hear this matter on the 29th day of December, 1925, at 11 o'clock A. M., at the Courtroom of the United States District Court at New Orleans, Louisiana, and then and there show cause, if any they have, why the preliminary injunction therein prayed for should not issue; and

Whereas it appears to the undersigned District Judge that there is danger of irreparable injury being caused to the complainant before the hearing of said application for this preliminary writ of injunction can be had, unless defendants are, pending such hearing, restrained as hereinafter set forth;

Therefore complainant's application for such restraining order is granted, upon his giving bond with good and sufficient surety to be approved by the Court in the penal sum of ten thousand dollars, securing the said defendants [fol. 19] against any loss or damage which may result from the issue of such order if it should be finally determined that the same was improperly issued or that it may award to them by reason of the granting of said order;

Now, therefore, it is ordered that Valentine K. Irion, Commissioner of Conservation of the State of Louisiana,

and Percy Saint, Attorney General of the State of Louisiana, be, and they are hereby specially restrained and enjoined until further order of this Court, as follows:

(1) From interfering, or attempting to interfere, with the erection by complainant, J. Smylie Herkness, of a factory on the land described in the bill of complaint for the manufacture of natural gas into carbon black, or with the operation of such factory for the manufacture of carbon black, or with the production of natural gas by complainants from the two gas wells described in the bill of complaint, or with the manufacture thereof into carbon black.

(2) From inflicting or imposing, or attempting to inflict or impose or collect any fine or penalty against complainant, J. Smylie Herkness, for the erection by him of a factory on the land described in the bill of complaint for the manufacture of carbon black, or for the operation thereof, or for the production of natural gas from the gas wells described in the bill of complaint and its manufacture into carbon black, and from ordering, requesting, or instituting any suit, either civil or criminal in its nature, against complainant, to interfere with the construction, operation or use of his factory on the land aforesaid in the manufacture of carbon black from the gas from the wells aforesaid, or to punish complainant by the infliction of fines or penalties for erecting said factory or operating same or producing the natural gas from said wells and manufacturing same into carbon black.

It is further ordered that a copy of this order, certified under the hand of the Clerk and the seal of the Court, be served on each of the defendants to be restrained thereby, and that the hearing of this cause on an application for an interlocutory injunction be had and proceeded with in ac- [fol. 20] cordance with Section 266 of the Judicial Code of the United States and that the Governor of Louisiana, and the Attorney General thereof be notified of said hearing in accordance with law.

(Signed) Louis H. Burns, Judge.

[fol. 21] Bond on restraining order for $10,000, approved December 17, 1925, omitted in printing.

[fol. 22] In United States District Court

[Title omitted]

Answer—Filed January 21, 1926

To the Honorable the District Court of the United States for the Eastern District of Louisiana, New Orleans Division:

Now into Court, through undersigned counsel, comes Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, and Percy Saint, Attorney General of the State of Louisiana, and make this their joint and several return to the order of Hon. Louis H. Burns, Judge of the U. S. District Court of the Eastern District of Louisiana that your Respondents appear before this special tribunal and show cause why the preliminary injunction herein prayed for should not issue:

1. That this Court has no jurisdiction rationæ personæ or rationæ materiæ.

2. That these proceedings purport to be brought under Article 266 of the Federal Judicial Code and that said Section of said Code does not authorize these proceedings.

3. That this is a suit against the State of Louisiana contrary to the Eleventh Amendment to the Federal Constitution.

4. That the bill herein is insufficient in fact to constitute a valid cause of action in equity, and that relator has an adequate remedy at law.

Reserving the benefit of said exceptions and not waiving same, your Respondents answer and say that the restraining order herein already issued should be recalled because:

5. Your first named Respondent, under advice of your second named Respondent, refused relator the permit to manufacture carbon black that relator alleges was refused him and your Respondents did inform relator that they would use all legal means at their command to prevent the [fol. 23] manufacture of carbon black without a permit.

6. Under article 6, section 4 of the constitution of the State of Louisiana the Governor thereof has appointed your first named Respondent Commissioner of Conservation of said State to direct and control the Department of Conservation,—a department created to protect, conserve and replenish the natural resources of the State of Louisiana.

6½. That your second named Respondent has been elected by the people of the State of Louisiana Attorney General of said State and as such Respondent has charge of all legal matters in which the State of Louisiana has an interest.

7. That whatever acts Relator charges your Respondents have done or are about to do, have been done or will be done in their said capacities representing the State of Louisiana.

8. That more than twenty years ago large and valuable deposits of natural gas and oil were discovered to lie beneath the lands of this State, in the parishes of Ouachita and Morehouse, commonly known as the Monroe Gas Field, where Relator avers the lands owned by him are situated.

9. That said deposits of natural gas and oil are more than 2,000 feet beneath the surface of the earth, are not the private property of the owners of the surface of the lands but are the property of the State of Louisiana and of the people thereof and have been so declared by the Supreme Courts of the United States and of the State of Louisiana.

Ohio Oil Company v. Indiana, 177 U. S., 190;
Frost-Johnson Co. v. Salling, 150 La., 756.

10. That the extraction of natural gas from the common property of the State or from the reservoirs that lie beneath the lands of these Parishes, for the purpose of reduction to private ownership and conversion into carbon black, is subject to regulation, control or complete prohibition by the State of Louisiana.

Wells v. Midland Carbon Co., 254 U. S., 300.

11. That the extraction of natural gas from the soil and the making of the same into carbon black, which Relator declares he exclusively intended to do and is by Respondents

[fol. 24] prevented from doing, is a waste and the greatest waste of the natural resources of the State of Louisiana.

12. That natural gas is well suited for fuel and lighting for industrial and domestic purposes and that the natural gas of the Monroe Oil Field is being largely used for said purposes now and will be used to a greater extent in the near future; that the city of Monroe, which adjoins the Monroe Gas Field, and other towns and industrial plants in the neighborhood of said Field, are greatly dependent on said Field for their supply of gas for fuel and lighting, in industrial and domestic purposes; that there is now being constructed a pipe line whereby the natural gas of the Monroe Gas Field will be conducted from the Field to Baton Rouge—the Capital—and one of the principal cities of the State of Louisiana and will there be largely used, at a vastly cheaper price, for fuel and lighting for industrial and domestic purposes.

13. That the efficiency of the operation of manufacturing carbon black from natural gas is far below the efficiency of using natural gas for fuel purposes, either industrial or domestic, and that when properly based on heat units the efficiency of the operation of manufacturing carbon black is not over 1.75 [illegible].

14. That the amount of natural gas which is thus now wasted in the Monroe Field by carbon black makers in one day would supply the entire city of New Orleans for industrial and domestic purposes for [illegible] days.

15. That Federal and State experts all agree that carbon black should not be made from high pressure gas except where it could not be used for fuel or other purposes; that carbon black should be made exclusively from casing head gas, that is gas produced incidental to the production of oil and from gas that would otherwise go to waste.

16. That Relator contemplates and so declares that he will manufacture carbon black from high pressure natural gas and not from casing head gas.

17. That in every gas producing state of the Union but this the carbon black manufacturers have been relegated to the exclusive use of casing head or waste gas.

[fol. 25] 18. That enormous quantities of high pressure gas have been wasted in the Monroe Gas Field by the carbon black industry until the Field has already been depleted one sixth of the entire supply and to a large extent the industrial and domestic use of natural gas has been debarred by the carbon black manufacture.

19. That on November 2, 1925, the U. S. Department of Commerce, Bureau of Mines, issued a Bulletin on carbon black produced from natural gas in 1924, wherein it is said "Louisiana in 1924 not only lead all the states in the production of carbon black, as it has done since 1921, but increased its relative standing by producing 77 per cent of the total output of this country." This, because every gas producing state in the Union has adopted repressive measures to prevent the waste of its natural gas by the carbon black industry.

20. That the state of Louisiana for nearly twenty years has been enacting laws to prevent the waste of natural gas by its manufacture into carbon black or its use for other than industrial or domestic purposes.

21. That by Act 71 of 1906, page 111, it was made unlawful to wastefully burn natural gas.

22. That by Act 144 of 1908, page 200, the Conservation Commission was created, to report, among other things, on "the prevention of waste in the extraction of oil, gas and other minerals and to suggest appropriate legislation."

23. That by Act 172 of 1910, page 255, the legislature continued such Commission.

24. That by Act 180 of 1910, page 313, the conservation of natural gas by regulations to prevent waste was enacted.

25. That by Act 196 of 1910, page 329, a conservation fund was created, to be supported, among other things, by a tax on natural gas.

26. That by Act 283 of 1910, page 484, the wasteful burning of natural gas was prohibited.

27. That by Act 268 of 1918, page 513, it was made a crime to wastefully burn natural gas.

[fol. 26] 28. That in 1918, by Act 270, page 516, an act was passed looking to the conservation of natural gas.

29. That in 1922, by Act No. 91, page 172, an act to regulate and control the use of natural gas and the manufacture of carbon black and to prescribe penalties for the violation of the act, was passed.

30. That in 1924, Act 252, page 594, was adopted, to conserve the natural gas resources of the state and to define the conditions under which natural gas can be burned into carbon black; to limit the amount that can be produced; and giving your first named Respondent as Commissioner of Conservation authority to make rules and regulations for the conservation of natural gas.

31. The above showing a fixed legislative policy of the State to prevent the destruction of the rights of the State and of the people thereof by anyone who wasted same.

32. That since April 14, 1924, no permit has been issued by the Conservation Commission to anyone to extract natural gas from the soil for the purpose of manufacture into carbon black and that all permits that have been applied for have been refused.

33. That, in spite of the policy of the State of Louisiana, as declared by its legislative acts and in spite of the public declarations of your first named Respondent as Commissioner that he would grant no more permits for the waste of gas by manufacture into carbon black, Relator in June, 1925—long after said policy had been established—came into this State and purchased property which he alleges has no substantial value except for the purpose of producing natural gas and its manufacture into carbon black.

34. That your first named Respondent is ordered by the Constitution of the State to protect, conserve and replenish the natural resources of the State; that the issue by him of further permits to manufacture carbon black from natural gas would result in its waste and complete exhaustion; that Respondent is given by law the right to issue further permits in his official discretion; that he has embarked on a policy of not renewing permits already granted and has only permitted those who are already engaged in the manufacture of carbon black to continue same to a limited ex-

[fol. 27] tent because the sudden shutting down of their plants would result in the destruction of the large investments which have been made; that he is reducing the quantity of natural gas that can be made by the owners of wells already operating with the end in view of ultimately stamping out the industry in this State without too heavy a loss to those already engaged in the industry.

35. That the carbon black industry is a migratory one, has been driven from state to state, as the people of the state in which they locate discover that they are uneconomically exhausting the natural resources thereof that should be devoted to the permanent industrial development and domestic comfort of its people.

36. That the Commission has been gradually reducing the output of carbon from high pressure gas in this State; that on March 1, 1925, it curtailed the supply of gas devoted to carbon black in the Monroe Field to 299,000,000 feet per day and on September 1, 1925, to 290,000,000 feet a day and on March 1, 1926, to 275,000,000 feet a day; that at one time the carbon black plants of the Monroe Field were using such gas to the extent of 450 to 500 million feet a day; that the carbon black plants of the Monroe Field are only now operating at 63 per cent capacity and that within a reasonable time, your first named Respondent will have completely suppressed the use of natural gas in carbon black manufacture in this State.

37. That if no discretion in the suppression of waste of natural gas is vested in your first named Respondent, he must grant permits to all applicants who own gas wells and the policy of the State of Louisiana of preserving natural gas for industrial and domestic use of its people will be defeated.

Wherefore respondents pray that the preliminary restraining order herein issued be recalled and that this suit be dismissed, and for general relief.

(Sgd.) Percy Saint, Attorney General. Wm. H. Thompson, Asst. Atty. General. Edw. Rightor, Special Counsel.

[fol. 28] *Duly sworn to by Valentine K. Iron and Percy Saint. Jurats omitted in printing.*

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. SMYLIE HERKNESS—Filed January 21, 1926

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

J. Smylie Herkness, being duly sworn according to law, deposes and says that he is the Complainant in the above entitled action and that he is a citizen of the State of Pennsylvania. That he is the owner in fee simple of eighty acres of land situated in the Parish of Morehouse, State of Louisiana, and that he is the owner of the exclusive right to mine and drill, for the purpose of producing natural gas, seven hundred sixty acres of land situated in the Parish of Ouachita and the Parish of Morehouse in the State of Louisiana, and that he purchased said land and said rights at a cost of Two Hundred and twelve Thousand Dollars for the purpose of erecting a plant for the manufacture of carbon black, and that he is about to expend more than One Hundred Thousand Dollars for the construction of such a plant. That the said property is without any substantial value except for the purpose of producing natural gas and manufacturing it into carbon black. That, under permits issued by the Department of Conservation of the State of Louisiana, the drilling of two natural gas wells has been completed on said tracts of land, said wells being numbered 130 and 131 on the official map of the Department of Conservation of the State of Louisiana.

That on October 29, 1925, deponent filed with the Department of Conservation an application for a permit to erect a factory for the manufacture of carbon black and that on November 23, 1925, his application was refused, and that true copies of his application and of the letter of rejection are attached to his Bill of Complaint in the above case marked Exhibits "A" and "B." That he is and has [fol. 30] been at all times ready and willing to observe and comply with any and all laws enacted by the Legislature of the State of Louisiana relative to the use of natural gas and its manufacture into carbon black.

That defendant, Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, has adopted and publicly announced as a fixed rule of the Department of Conservation that he will refuse to permit any person not now actually engaged in the manufacture of natural gas into carbon black to engage in such business and that he will vigorously prosecute and/ and all persons who attempt to do so, without a permit from the Department of Conservation.

That the property which deponent owns is situated within the Monroe gas field which is the most important source of supply of carbon black for the manufacture of news inks in the United States and that deponent desires to construct a plant in which he will manufacture news inks and also carbon black for the purpose of selling said carbon black and news ink to the Charles Enen Johnson Company, a company which has been engaged in the manufacture of news inks for over one hundred and twenty years, and that if the said Charles Enen Johnson Company is unable to buy carbon black from the plant which deponent desires to erect it will be compelled to buy carbon black from the products of other gas wells in the Monroe field from which it has been purchasing carbon black ever since carbon black was manufactured in said field. That within the last year a combination has been entered into of many carbon black manufacturers now in the fields with the result that an absolute monopoly in respect to carbon black and an unrestricted power to advance the price thereof have been established, and that since the formation of said combination the price of carbon black has already materially advanced.

All of the above facts are true.

(Signed) J. Smylie Herkness.

Sworn to and subscribed before me this 28 day of December, A. D. 1925. (Sgd.) M. A. Hirschfeld, Notary Public. My commission expires Mar. 2, 1929. (Seal.)

[fol. 31] Exhibit to Affidavit of J. Smylie Herkness

Act of Sale from United Carbon Company to J. Smylie Herkness—Filed January 21, 1926

State of Louisiana,
Parish of Ouachita:

Be it known that on this, the 18th day of June, A. D. nineteen hundred and twenty-five, before me, Carl H. McHenry, notary public in and for said parish and State, personally came and appeared United Carbon Company, a corporation duly organized and chartered under the laws of the State of Delaware and legally authorized to do business in the State of Louisiana, herein represented by Oscar Nelson, its Vice-President, duly authorized to act herein by a resolution of the Board of Directors of said Corporation, a certified copy of which resolution is hereto annexed, who declared and acknowledged that for the price hereinafter expressed it has sold, conveyed and delivered, and by these presents does sell, bargain, transfer, assign, set over and deliver unto J. Smylie Herkness, a resident of the city of Philadelphia, State of Pennsylvania, present and accepting this sale for himself, his heirs and assigns, the following property, together with the improvements and appurtenances thereunto belonging, situated in the parish of Ouachita, and parish of Morehouse, State of Louisiana, to-wit:

(a) S. ½ of the S. E. ¼, Sec. 18, Tp. 20 N. R. 5 E., Louisiana Meridian, except the right of way of the A. & L. M. Railroad Company, and the right of way of the Southern Carbon Company now existing over said property and except a two-twelfths (2-12) royalty interest in favor of George T. Young, and a one twelfth (1-12) royalty interest in favor of Thomas H. Boyles of all the oil that may be taken from said land, this royalty to be delivered to the said parties by delivering to their credit free of cost in the [fol. 32] pipe line to which the said grantee may connect its wells, but without the payment of any royalty, whatsoever on gas.

(b) All of the gas in and under the following described land and the exclusive right to mine, drill and take all of

the gas from the said described land, to-wit: W. ½ of the S. E. ¼; S. E. ¼ of S. W. ¼, N. ½ of the S. W. ¼ and the N. W. ¼, Sec. 17; the N. ½ of the N. E. ¼ S. E. ¼ of the N. E. ¼ N. ½ of S. E. ¼, the S. E. ¼ of S. W. ¼ and N. ½ of S. W. ¼, Sec. 18 and the S. E. ¼ of N. E. ¼, N. E. ¼ of S. E. ¼, Sec. 20, all in Twp. 20 N. R. 5 E. Louisiana Meridian, with full rights of ingress and egress for the said purchaser, his employees, vehicles and teams to go in and upon the said described land, for the purpose of drilling the said described land, for the purpose of drilling, mining and taking therefrom the said gas for a period of 50 years from June 30th, 1923, or as much longer thereafter as gas may be produced in paying quantities from said lands; this conveyance of all gas to be without payment of any royalty, whatsoever,

(c) The said grantee to have the right to build carbon plants, gasoline extraction plants, outhouses, and all necessary residences for the purpose of housing its employees who may be hired to operate such plants, and to lay such pipe lines as may be required in the operation of its business or any part thereof.

It is the intention of this Vendor to sell, convey and deliver to this Vendee, all of the property, right, title and interest acquired by Magnolia Carbon Company from Victor C. Barringer by virtue of act of sale and conveyance passed on August 23rd, 1923, before M. C. Thompson, a Notary Public, in and for the Parish of Ouachita, State of Louisiana, and recorded in conveyance book 122, page 150 et seq. of the records of Ouachita Parish, Louisiana, together with all buildings, improvements and appurtenances placed upon or additions to the above described property since the date of the said conveyance aforesaid, as well as all gas and water wells, drilled or placed upon said property, since the date of the conveyance aforesaid, and all machinery, equipment, appliances and appurtenances belonging to or connected with said wells; with full and general warranty; [fol. 33] to have and to hold the said above described property unto the said purchaser, his heirs and assigns forever.

The parties to this act agree to dispense with the production of the Certificate of Mortgage required by Article 3364 of the Civil Code of this State, and tax receipts showing all

taxes to have been paid, and exonerate me from any liability in the premises.

The price for which the above sale is made is the sum of Two Hundred and Twelve Thousand Dollars ($212,000) cash in hand paid, receipt of which is hereby acknowledged and full acquittance therefore given,

Thus done and passed, in the presence of E. T. Lamkin and H. D. Montgomery, witnesses of lawful age, domiciliated in this Parish, who hereunto sign their names, together with the said parties, and me, the said Notary, on this 18th day of June in the year of our Lord, One Thousand Nine Hundred and Twenty-five.

United Carbon Company, by Oscar Nelson, Vice-President. (Seal.)

Attest: E. T. Lamkin, H. D. Montgomery. Carl H. McHenry, Notary Public. (Seal.)

Stamps $222.00.

[fol. 34] Resolution Adopted by the Board of Directors of United Carbon Company at a Special Meeting Held on June 3rd, 1925

"Upon motion duly made and seconded, the following preamble and resolutions were unanimously adopted:

Whereas, J. Smylie Herkness, in accordance with the term of the contract between him and this Company, hereinbefore in these minutes fully set out, will be entitled to a deed covering the property originally conveyed to this Company by Magnolia Carbon Company when such property is released from the lien of this Company's First Mortgage to Guaranaty Trust Company of New York, as Trustee, dated April 1, 1925; and

Whereas, all the resolutions necessary to authorize and secure such release have heretofore been passed by this Board, and all other requisites to the procuring of such release have been complied with by this Company; and

Whereas, a deed has been prepared to be executed by this Company to J. Smylie Herkness conveying to him the property to which he is entitled under the aforesaid contract, which deed is in the following form, to wit:

(Copy of the deed to which these resolutions are attached appears in full in original minutes.)

Now, therefore be it resolved, that the President or a Vice-President of this Company be, and they hereby are, authorized empowered and directed to immediately, upon the execution of the release of the property described in the forgoing deed by the Guaranty Trust Company of New York, as Trustee, from the said Mortgage dated April 1, 1925, execute, acknowledge and deliver the deed of this Company to J. Smylie Herkness in the form above set forth and that the Secretary of this Company be, and he hereby is, authorized, empowered and directed to affix and attest the seal of this Company thereto; and

Be it further resolved, That the officers above mentioned do all things necessary to satisfy the said J. Smylie Herk- [fol. 35] ness that the property covered by the foregoing deed has been properly released from the said Mortgage; and

Be it further resolved, That the said officers of this Company accept the consideration to be paid by the said Herkness and dispose of the same in accordance with the contract between this company and the Magnolia Carbon Company hereinbefore in these minutes fully set forth."

I, G. A. Williams, hereby certify that I am the Secretary of United Carbon Company, a Delaware Corporation, and that the foregoing is a true and correct copy of resolutions duly adopted by the Board of Directors of said Company at a Special Meeting of said Board, duly called and held at Room "E" McAlpin Hotel of New York City, on the 3rd day of June, 1925, at which a quorum was present and voted in favor of said resolutions.

In witness whereof, I have hereunto affixed the seal of said corporation this 5th day of June, 1925.

G. A. Williams, Secretary. (Seal.)

A true record this July 9, 1925. Mattie R. Faust, Deputy Clerk & ex Officio Recorder.

[fol. 36] State of Louisiana,
Parish of Ouachita:

I hereby certify that the within and foregoing is a true and correct copy of the record, together with all endorsements thereon, and resolution thereto, attached as same appears on file and of record in Conveyance Book No. 138 page 591 of the records of Ouachita, Ph. La.

This 20th day of January, A. D. 1926.

(Signed) Mattie R. Faust, Deputy Clerk and ex officio, Notary Public. (Seal.)

[fol. 37] Minute entry of argument and submission January 21, 1926, omitted in printing.

[fol. 38] In United States District Court

[Title omitted]

Stipulation as Hearing—Filed January 22, 1926

It is hereby agreed between Percy Saint, W. H. Thompson and Edward Rightor, Solicitors for Defendants, and Saul, Ewing, Remick and Saul, Harry H. Russell and Spencer, Gidiere, Phelps & Dunbar, Solicitors for Complainant, that the hearing had in this suit on January 21st, 1926, shall be considered and treated as a final hearing in this suit, and that the Court may enter a final decree therein granting or denying a permanent injunction.

(Signed) Saul, Ewing, Remick & Saul, Harry H. Russell, Spencer, Gidiere, Phelps & Dunbar, Solicitors for Complainant. Percy Saint, Attorney General; W. H. Thompson, Asst. Attorney General; E. N. Rightor, Special Counsel, Solicitors for Defendants

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Rufus E. Foster, Circuit Judge, and William I. Grubb and Louis H. Burns, District Judges

OPINION—Filed March 6, 1926

BURNS, D. J.:

Complainant, a citizen of Pennsylvania alleges himself to be the owner of certain land, gas rights and wells in the Parishes of Morehouse and Ouachita, Louisiana, valued at more than $200,000.00, acquired in June, 1925, for the purpose of producing natural gas and manufacturing it into carbon black.

On October 29, 1925, he filed, with the defendant Commissioner of the Department of Conservation, a formal application for a permit to erect a factory for such manufacture of carbon black, which was refused by a letter, stating that, in accordance with a previous conversation with plaintiff's agent, the matter has been submitted for an opinion of the Attorney General of Louisiana, as to the power and authority of the Commissioner of Conservation under the State law. The Commissioner's letter enclosed a copy of the Attorney General's opinion. The letter also recited that the application was denied, and further, that:

"It has been the policy of this department to curtail rather than increase the consumption of natural gas for the purpose mentioned. It would therefore be folly for me to sanction the erection of additional plants under such circumstances."

It appears that, by various acts of the Louisiana Legislature since the discovery and development of the oil and gas fields of Morehouse and Ouachita Parishes, the general regulation of gas production and use has been extended with increasing restrictions, placing the adminis-[fol. 40] trations thereof in the Department of Conservation and under the direction of the Conservation Commissioner, who, since the year 1924, has issued no permits for

the building of carbon black plants. He had then proclaimed publicly that he would issue no new permits and that those permits already issued would not be renewed.

In the face of this declared policy, the complainant alleges that he acquired the property in question in 1925 with a view to erecting a factory and manufacturing carbon black. He further alleges that the property "is without substantial value except for the purpose of producing natural gas and manufacturing it into carbon black."

The complainant contends that the Commissioner of Conservation was not delegated the power, by the Statutes of Louisiana, to enforce a rule prohibiting any person from engaging in the manufacture of carbon black who were not so engaged at the time of the adoption of such rule, particularly since the Statutes authorize the manufacture of carbon black; and therefore any and all persons may so engage at any time, upon compliance with the provisions of law and the lawful regulations of the Conservation Commissioner, as he intends doing; that if the Statutes are construed as delegating such power to the Conservation Commissioner, then such laws are in violation of the Louisiana Constitution, which prohibits the delegation of legislative power to commissioners, boards and executive officers generally, and prohibits deprivation of property without due process of law, and also Section 1 of the Fourteenth Amendment to the Constitution of the United States, likewise prohibiting [fol. 41] a state from depriving a person of property without due process of law, or denying to any person equal protection of the law; that the inevitable effect of the rule adopted by the Conservation Commissioner is to create a monopoly in favor of those now engaged in the manufacture of carbon black, by a wrongful discrimination between that class already so engaged and those who may, in future, desire to so engage, prohibiting the latter class from engaging therein. There is no suggestion that, as between all of the latter class, there is any discrimination.

The substantial complaint is that the respondent Conservation Commissioner, who has refused complainant, and all others, a permit for a new factory, and the Attorney General of Louisiana, will, unless enjoined, institute criminal proceedings against him, or any other person engaging in

such manufacture without a permit, under Act 252 of the General Assembly of Louisiana of the year 1924, which provides that the Commissioner may issue such permits, and any persons operating without same shall be guilty of a misdemeanor punishable by a fine of not less than one hundred dollars or more than ten thousand dollars for each day such manufacture shall continue. There is no suggestion that the complainant has been deprived, as owner, of the complete dominion of his land, nor of the right to mine, drill or otherwise extract gas from the wells thereon, or to dispose of it for fuel or lighting, or for industrial or other purposes as freely as any other owner of such lands and gas wells and of gas reduced to possession.

It is not alleged that the Act of the Louisiana Legislature, No. 252 of 1924, is unconstitutional and therefore void, either under the Constitution of the State or of the [fol. 42] United States, or that an order has been made by the Conservation Commissioner, acting under the statute, as would confiscate or deprive him of a property right before judicial review, and therefore would justify the interference of this Court by issuing an injunction.

The relief prayed for is that the Commissioner and the Attorney General be enjoined: (1) from interfering with the erection of a factory by complainant, and with the subsequent manufacture of carbon black therein; (2) from instituting any suit, civil or criminal, against complainant, by which to penalize him or interfere with such erection of a plant and manufacture.

No proceedings have been filed in the State courts, either by complainant seeking relief to compel the issuance of a permit, or by the Attorney General, charging an offense under the statute.

Under these circumstances it is important to determine whether the case is one substantially within the jurisdiction of this Court, and properly brought within the purview of Section 266 of the Judicial Code.

The owners of land do not own the gas lying below it. Such gas is not susceptible of ownership until reduced to possession. Its extraction and use is subject to regulation, or even complete restriction or suppression by the State. Frost-Johnson Lumber Co. v. Stallings Heirs, 150 La. 756;

Bosleaw v. Cox, 106 Southern 313; Walls v. Midland Carbon Co. 254 U. S. 300-323.

If we should assume that the general unwritten policy or rule of the Conservation Commissioner, denying permits generally, or that his letter denying a permit to plaintiff amounts to an order of an administrative board of the [fol. 43] Commission, acting under and pursuant to a State statute, within the meaning of Section 266 of the Judicial Code, this finding would, of itself, not give the Court jurisdiction, because Section 266 merely prescribes a method of procedure. Wadley S. R. Co. v. Georgia, 235 U. S. 651, 661; 59 L. Ed. 411.

It is equally true that if the unconstitutionality of such an order was well pleaded, this Court would have jurisdiction and owe a duty to try the question whether a preliminary injunction should issue, despite the fact that the unconstitutionality of the statute is not pleaded. Oklahoma Gas Co. v. Russell, 261 U. S. 293.

Of course, the unconstitutionality of either the statute or an administrative order, under the State Constitution, does not concern this Court, which is concerned only with violations of the Federal Constitution. Cook v. Burnquist, 242 Fed. 231.

If the granting of a permit is not discretionary with the Conservation Commissioner, but a ministerial duty he owes under the statute, then plaintiff's right to a judicial review by mandamus proceedings would be plain, adequate and complete. (Sec. 267 J. C.). If it is discretionary, and the Commissioner has mistaken or exceeded his authority, and this results in a prosecution for a misdemeanor, this fact is available as a complete defense. Such judicial review would not be merely nominal and illusory, because the plaintiff is not at the risk of having to pay confiscatory penalties pending a determination of the validity of the order. If it be said that such remedies at law, in the State courts are not adequate because the remedy at law to be considered must be one within the Federal court, where jurisdiction in equity is sought, we are then confronted with the fact that [fol. 44] the Federal courts have no jurisdiction of an original action to issue a mandamus, except as an ancillary remedy in aid of its jurisdiction, otherwise previously

obtained, even though the relief sought concerned a right secured by the Constitution. See Covington and Cincinnati Bridge Co. v. Hager 203 U. S. 109, holding:

"We deem it settled, in controversy, until Congress shall otherwise provide, that Circuit (District) Courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States."

Whilst the complainant prays in terms for a mandatory injunction, restraining the Commissioner and the Attorney General from interfering with the erection of a factory, and the subsequent manufacture of carbon black therein, this prayer is, in effect, equivalent to one for the issuance of a writ of mandamus to compel the Conservation Commissioner to submit to the erection of the factory in question and the manufacture of carbon black, thereby accepting the judgment of this Court in lieu of the permit provided for by the statute. See Warner Valley Stock Company v. Smith, 165 U. S. 28-33; Creager et al. v. Bryan, County Judge, et al., 287 Fed. 362.

The remedy by mandamus is essentially and exclusively a legal remedy and is unknown to courts of equity. Assessor of Vernon Parish v. Gould, C. C. A. 5th Circuit, 210 Fed. 894. If, therefore, the remedy is by mandamus, and plaintiff has a remedy at law afforded him by a statute of Louisiana, the case might properly be transferred to the law side of the Court and there be proceeded with under the terms of Equity Rule No. 22, since the jurisdiction here is sought upon a diversity of citizenship and an alleged Federal question, except for the fact that United States Courts [fol. 45] have no jurisdiction in original cases of mandamus (8 Encyc. U. S. Supreme Court Reports, 20.)

The second prayer of the bill is in no better case. The prayer amounts to no more than that this Court, as a Court of Equity, may competently intervene to restrain threatened criminal proceedings for the alleged violations of a statute alleged to be valid and consitutional, upon the ground that such proceedings, by a misapplication of the statute, may work an injury to complainant's proposed

business. This, the Courts of the United States are forbidden to do; Section 265 of the Judicial Code specifically prohibits injunctions to stay proceedings in State Courts: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The exceptional cases in which a Court of Equity is justified in interposing its restraining arm to prevent criminal prosecution are stated in Re Sawyer, 124 U. S. 200, 31 L. Ed. 402; Davis and Farnham v. Los Angeles, 189 U. S. 207, 47 L. Ed. 778; and Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169.

From these decisions it appears well settled that in cases only where property rights would be destroyed, criminal proceedings under a void law or an ordinance may be reached and controlled by a Court of Equity. In this case these necessary elements are not present in the bill, and the sole injury or loss to the complainant would be such only as might arise from his arrest and prosecution. His bill clearly shows that he anticipates, only, some action by a State officer under a penal Statute, by reason of a wrongful [fol. 46] construction of same. If the State officers sought to be enjoined are proceeding under a valid statute of the State, they represent the State, and a suit to enjoin them is a suit against the State, within the meaning of the Eleventh Amendment to the Constitution. On the other hand, if the proceedings are to enforce an unconstitutional statute or ordinance, the persons seeking to enforce it on behalf of the State are not considered as representing the State, but act as individual wrongdoers, and a suit to enjoin them is therefore held not to be a suit against the State. Central Consumers Co. of New Jersey v. Austin, 228 Fed. 619.

"If the statute is conceded to be valid, a Federal Court of Equity has no more right to interfere with the enforcement of the State's criminal laws by its law officers, through its courts, because of anticipated errors in the construction of the Statute by the Judge, than it would have to interfere because of anticipated errors in the decision of facts by a jury." Ibid. See also Hoffman v. McElligott, 259 Fed. 525.

The contention of complainant that his deprivation of the permit amounts to a deprivation of his property without due process of law and denies him the equal protection of law, does not sufficiently show that the refusal of a permit made any distinction between himself and any other persons who have been so denied since the adoption of the Commissioner's policy or rule. Should we concede that the denial of this permit amounted to a deprivation of property, it would not follow that the rule or policy of the Commissioner was contrary to the 14th Amendment. In Granger et als. v. Douglas Park Jockey Club, C. C. A. 6th, 148 Fed. 513, it was held that the constitutionality of a statute must [fol. 47] be determined by its provisions and not by the manner in which it is in fact administered. A statute or ordinance depriving one of his liberty or property, is not in violation of the 14th Amendment merely because of such deprivation; nor is every classification made under the police power of a state voidable therefor; the test is that to be valid they rest upon some reasonable public policy and some real and substantial relation to the object sought to be accomplished; and every presumption is in favor of the rightful exercise of its power by the legislature or officer acting under its authority.

From these considerations it follows that the complainant's bill must be dismissed.

(Signed) Louis H. Burns, Judge.

New Orleans, March 6th, 1926.

Foster, C. J., ad Grubb, D. J., concur.

[fol. 48] In United States District Court

[Title omitted]

Decree—Filed March 6, 1926

This cause came on to be heard at a former day upon the pleadings, exhibits, affidavits and evidence and was argued and submitted by counsel for the respective parties;

Whereupon, and on due consideration thereof, and for the reasons assigned in the written opinion on file.

It is ordered, adjudged, and decreed that the bill of complaint of the complainant J. Smylie Herkness, be and the same is hereby dismissed, with costs.

(Signed) Rufus E. Foster, (Circuit Judge), W. I. Grubb (District Judge), Louis H. Burns (District Judge).

[fol. 49] In United States District Court

[Title omitted]

Petition for Appeal.—Filed March 20, 1926

To the Honorable Rufus E. Foster, William I. Grubbs, and Louis H. Burns, sitting herein as a special tribunal for the District Court of the United States for the Eastern District of Louisiana under the provisions of Section 266 of the Judicial Code:

Now comes J. Smylie Herkness, petitioner herein, through his undersigned counsel, and shows that heretofore a restraining order was granted to him in this case on his application; that thereafter, his application as Complainant, for an interlocutory injunction was referred by the Honorable Louis H. Burns, District Judge for the Eastern District of Louisiana to a special tribunal composed of the Honorable Rufus E. Foster, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable William I. Grubb, United States district Judge for the Northern District of Alabama, and the Honorable Louis H. Burns, United States District Judge for the Eastern District of Louisiana, under the provisions of Section 266 of the Judicial Code; that after due notice, said application for an interlocutory injunction against the defendants came on to be heard on the 21st day of January, 1926, before said special tribunal; that it was stipulated at the time of said hearing between counsel representing petitioner and counsel representing the defendants, that the hearing had on January 21, 1926, should be considered and treated as a final hearing in this suit, and that the court might enter a final decree therein granting or denying a permanent injunction; that on March 6, 1926, a final decree was entered and signed, denying petitioner's application

[fol. 50] for an injunction and dismissing petitioner's suit at his cost.

Petitioner, J. Smylie Herkness, feeling aggrieved by the said decree refusing the said injunction and dismissing petitioner's suit at his cost, hereby prays that an appeal may be allowed to him from the judgment and decree aforesaid, rendered by the said special tribunal to the Supreme Court of the United States, because said injunction was not granted as prayed for by petitioner, and because the decree refusing to grant said injunction was contrary to the law and the evidence, and petitioner submits herewith his assignments of error and prays for a reversal of said judgment and decree, and prays a writ of injunction be granted in accordance with the prayer of plaintiff's petition, and for such further relief as may be proper.

Petitioner further shows that if a supersedeas be not granted herein, and if an order be not entered herein maintaining the statue quo ante said decree, and enjoining and restraining defendants herein, as prayed for in petitioner's bill, until the supreme Court of the United States shall have passed upon said appeal, irreparable injury will accrue to it, and it will otherwise be without remedy in the premises.

Petitioner shows that the order of the defendant, Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, which is attacked in these proceedings, is an order refusing to issue a permit to petitioner for the erection of a plant for the manufacture of natural gas into carbon black upon certain land purchased by petitioner in the month of June, 1925, together with gas rights and wells on or adjacent thereto, for the sum of Two Hundred and Twelve Thousand ($212,000.00) Dollars in cash; that said lands, gas rights and gas wells derive their value entirely from the fact that said natural gas may be utilized for manufacture into carbon black; that said natural gas is not available for any other use than for its manufacture into carbon black, on account of the physical situation of said property, and that said property, consisting of said lands and said gas rights and wells, is without any substantial value, except for the purpose of producing natural gas and manufacturing it into carbon black; that the construc-
[fol. 51] tion by petitioner on said property of a plant for the manufacture of said natural gas into carbon black

will cost in excess of One hundred Thousand ($100,000.00) Dollars; that unless An order is entered enjoining and restraining the defendants, pending the appeal, in the manner prayed for in petitioner's Bill, petitioner will either be forced to let said lands, gas rights and wells remain idle and to defer the construction of said carbon black plant until the determination of said appeal by the Supreme Court of the United States, during which time the gas underlying said lands and the lands adjacent thereto and constituting the gas reservoir common to said lands and the adjacent lands, and supplying the gas wells of petitioner, will be withdrawn, by other persons who are extracting gas from said common reservoir and manufacturing therefrom carbon black under permits issued to them by the Commissioner of Conservation of the State of Louisiana and with his acquiescence and approval, or petitioner will have to proceed with the erection and operation of said carbon black plant and thereby subject himself to repeated criminal prosecutions, involving the infliction of enormous fines and penalties, and the forfeiture of his right to do business in Louisiana.

Wherefore petitioner prays:

(1) That an appeal may be allowed to him herein from the judgment and decree entered herein on the 6th day of March, 1926, and hereinabove complained of;

(2) That an order of supersedeas may be entered herein, pending the final disposition of the cause;

(3) That an order may be entered maintaining the status quo ante the final decree herein, pending the hearing and determination of this appeal by the Supreme Court of the United States, and enjoining and restraining the defendants herein, Valentine K. Irion and Percy Saint, pending the hearing and determination of said appeal by the Supreme Court of the United States, from interfering or attempting to interfere with the erection by petitioner of a factory on the land described in the bill of complaint [fol. 52] herein for the manufacture of natural gas into carbon black, or with the operation of such factory for the manufacture of carbon black, or with the production of natural gas by petitioner from the two gas wells described in the bill of complaint, or with the manufacture thereof

into carbon black; and from inflicting or imposing, or attempting to inflict, impose or collect any fine or penalty against petitioner for the erection by him of a factory on the land described in the bill of complaint, for the manufacture of carbon black, or for the operation thereof, or for the production of natural gas from the gas wells described in the bill of complaint, and its manufacture into carbon black; and from ordering, requesting or instituting any suit, either criminal or civil in its nature, against petitioner to interfere with the construction, operation or use of his factory on the land aforesaid, in the manufacture of carbon black from the gas from the wells aforesaid, or to punish petitioner by the infliction of fines or penalties for erecting said factory or operating same or producing the natural gas from said wells and manufacturing same into carbon black;

(4) Petitioner prays that a transcript of the record, proceedings and papers upon which the decree and order of March 6, 1926 was made may be sent to the Supreme Court of the United States, at Washington, D. C.; and for such other and further orders as may be necessary in the premises, and for general relief.

(Signed) J. Smylie Herkness, Petitioner, by Saul, Ewing, Remick & Saul, Harry H. Russel, His Solicitors.

[fol. 53] In United States District Court

[Title omitted]

Assignments of Errors—Filed March 20, 1926

And now comes J. Smylie Herkness, Complainant herein, and says that the judgment and decree rendered in this case by the special tribunal composed of the Honorable Rufus E. Foster, the Honorable Louis H. Burns and the Honorable William I. Grubb, on the 6th day of March, 1926, in this case, is erroneous and against the just rights of said Complainant, for the following reasons: which are assigned as errors and as a part of the appeal upon which he will rely in the prosecution of this appeal, to wit:

(1) The Court erred in holding that it was not alleged in the Bill of Complaint, that the Act of the Legislature, No. 252 of 1924, is unconstitutional and therefore void, either under the Constitution of the State or of the United States;

(2) The Court erred in holding that it was not alleged in the Bill of Complaint that such an order has been made by the Conservation Commission, acting under said Act No. 252 of 1924, as would confiscate or deprive him of his property rights before a judicial review and would justify the interference of said court by issuing an injunction;

(3) The Court erred in holding that the owners of land have no property right in and to the gas contained in the field common to said lands and adjacent lands, and that the extraction and use of said gas by such land owners is subject to complete restriction or suppression by the State;

[fol. 54] (4) The Court erred in holding that it could not consider whether the statutes of Louisiana involved in this case, and the order of the Conservation Commission of Louisiana denying a permit to Complainant, violated any provision of the Constitution of Louisiana, and in holding that said Court was concerned only with violations of the Federal Constitution;

(5) The Court erred in holding that the fact that plaintiff had an adequate remedy at law in the state courts had any bearing upon the question of his right to the relief prayed for, for the reason that the test of the right of a Complainant to equitable relief in the Federal Courts is whether there is an adequate remedy at law in such Courts;

(6) The Court erred in holding that Complainant had an adequate remedy at law in the State Courts;

(7) The Court erred in holding that the relief prayed for was in effect equivalent to an application for the issuance of a writ of mandamus, and that for that reason it could not grant the relief prayed for;

(8) The Court erred in holding that this suit was in any wise, or as to any of the relief prayed for, a suit against the State within the meaning and intendment of the Eleventh Amendment to the Constitution of the United States;

(9) The Court erred in holding that the action of the Commissioner of Conservation in refusing to issue a permit to petitioner, and the statutes of Louisiana and particularly Act 252 of 1924, if construed as authorizing said Commissioner of Conservation to refuse said permit to petitioner, were not invalid and void, as denying the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States;

(10) The Court erred in denying petitioner the injunction prayed for, and in dismissing petitioner's suit;

(11) The Court erred in not holding that the statutes of Louisiana, and particularly Act 252 of 1924, did not authorize the Commissioner of Conservation of Louisiana to refuse permits for the manufacture of natural gas into carbon black, by persons who had not theretofore engaged in such industry;

[fol. 55] (12) The Court erred in not holding that if the laws of Louisiana are to be construed as delegating to the Commissioner of Conservation of Louisiana the right to decide and to provide by rule, regulation or otherwise, whether persons not theretofore engaged in the manufacture of natural gas into carbon black should be permitted to engage in said business, and to refuse to grant permits to such persons to engage in such business according as he might see fit, then such laws, and particularly Act 252 of 1924, are in violation of the provisions of Sections 1 and 2 of Article II, and of Section 1 of Article V of the Constitution of Louisiana of 1921, prohibiting the delegation of legislative power to the Executive Department, and providing that the Commissioner of Conservation should have such authority and powers as may be prescribed by the Legislature, and that the Legislature should enact laws to protect and conserve the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof;

(13) The Court erred in not holding that if the laws of Louisiana are to be construed as delegating to the Commissioner of Conservation of Louisiana the right to decide and to provide by rule, regulation or otherwise, whether persons not theretofore engaged in the manufacture of

natural gas into carbon black should be permitted to engage in said business, and to refuse to grant permits to such persons to engage in such business according as he might see fit, then such laws, and particularly Act 252 of 1924, are in violation of the provisions of Article — of Section 1 of the Constitution of Louisiana of 1921, prohibiting the deprivation of property, except by due process of law;

(14) The Court erred in not holding that if the laws of Louisiana are to be construed as delegating to the Commissioner of Conservation of Louisiana the right to decline and to provide by rule, regulation or otherwise, whether persons not theretofore engaged in the manufacture of natural gas into carbon black should be permitted to engage in said business, and to refuse to grant permits to such persons to engage in such business according as he [fol. 56] might see fit, while at the same time permitting persons theretofore engaged in said business to continue therein, then such laws, and particularly Act 252 of 1924, are in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, prohibiting any State from depriving any person of his property without due process of law, or denying to any person the equal protection of the law.

(15) The Court erred in not rendering a final decree in petitioner's favor, as prayed for, and in not issuing a permanent injunction as prayed for by petitioner.

(Signed) Saul, Ewing, Remick & Saul, Harry H. Russell, Spencer, Gidiere, Phelps & Dunbar, Solicitors for J. Smylie Herkness.

[fol. 57] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed March 20, 1926

This cause came on to be heard on this, the 20 day of March, 1926, upon petition of the Complainant, J. Smylie Herkness, for an appeap to the Supreme Court of the

United States from the final decree of the special tribunal to which it was referred, dated the 6th day of March, 1926, denying the injunction prayed for by Complainant against the defendants and each of them, and dismissing Complainant's bill at his costs; and the court having seen and considered the assignment of error exhibited with the petition for appeal,

It is ordered, that an appeal be and the same is hereby granted to said J. Smylie Herkness, to the Supreme Court of the United States from the Judgment and decree aforesaid.

It is further ordered, that a supersedeas be granted to said J. Smylie Herkness, as prayed for.

It is further ordered, that Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, and Percy Saint, Attorney General of the State of Louisiana, be and they are each hereby enjoined and restrained, pending the hearing and determination of said appeal by the Supreme Court of the United States, from interfering or attempting to interfere with the erection by petitioner of a factory on the land described in the bill of complaint herein for the manufacture of natural gas into carbon black, or with the operation of such factory for the manufacture of carbon black, or with the production of natural gas by petitioner from the two gas wells described in the bill of complaint, or with the manufacture thereof into carbon black; and from inflicting or imposing, or attempting to inflict, impost or collect any fine or penalty against petitioner for the erection [fol. 58] by him of a factory on the land described in the bill of complaint, for the manufacture of carbon black, or for the operation thereof, or for the production of natural gas from the gas wells described in the bill of complaint, and its manufacture into carbon black; and from ordering, requesting or instituting any suit, either criminal or civil in its nature, against petitioner to interfere with the construction, operation or use of his factory on the land aforesaid, in the manufacture of carbon black from the gas from the wells aforesaid, or to punish petitioner by the infliction of fines or penalties for erecting said factory or operating same or producing the natural gas from said wells and manufacturing same into carbon black.

It is further ordered, that said J. Smylie Herkness give bond in the sum of two thousand ($2,000.00) dollars, with good and sufficient surety to be approved by the Judge of the United States District Court for the Eastern District of Louisiana, or the Clerk of said Court, conditioned that appellant shall prosecute his appeal to effect and shall answer all damages and costs, if he fails to make his plea good. Said bond to be also conditioned for the repayment to defendants, or either of them, of any loss or damage which they, or either of them, may suffer as a result of the issuance and continuance of the injunction and restraining order issued herein, pending the determination of this appeal by the Supreme Court of the United States.

Dated this twentieth day of March, 1926.

(Signed) Rufus E. Foster, United States Circuit Judge for the Fifth Judicial Circuit. Louis H. Burns, United States District Judge for the Eastern District of Louisiana. William I. Grubb, United States District Judge for the Northern District of Alabama.

[fols. 59 & 60] Bond on appeal for $2,000.00, approved and filed March 20, 1926, omitted in printing.

[fol. 61] In United States District Court

[Title omitted]

Praecipe for Transcript of Record—Filed March 25, 1926

Honorable H. J. Carter, clerk:

You are requested to take a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Bill of Complaint and exhibits attached thereto and affidavit to said bill of complaint;

2. Order of court rendered upon presentation of Bill of Complaint;

3. Bond given in connection with restraining order;

4. Answer of defendants;

5. Affidavit of J. Smylie Herkness;

6. Certified copy of Act of Sale from United Carbon Company to J. Smylie Herkness;

7. Minute Entry of hearing on January 21st, 1926;

8. Stipulation of counsel that hearing should be treated as a final hearing;

9. Opinion of the Court;

10. Decree;

11. Petition for Appeal;

12. Assignment of Errors;

13. Order granting appeal and special injunction;

14. Appeal Bond.

(Signed) Spencer, Gidiere, Phelps & Dunbar, Attorneys for J. Smylie Herkness, Complainant and Appellant.

[fol. 62] State of Louisiana,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared, Esmond Phelps, who being duly sworn deposes and says:

That he is a member of the law firm of Spencer, Gidiere, Phelps and Dunbar, Solicitors for J. Smylie Herkness, Appellant in the above cause; that a copy of the above praecipe has been served upon Edward Rightor, Solicitor for Appellees.

(Signed) Esmond Phelps.

Sworn to and subscribed before me this 24th day of March, 1926. (Signed) Sumter D. Marks, Jr., Notary Public. (Seal.)

[fol. 63] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] Citation, in usual form, showing service on Percy Saint, filed March 30, 1926, omitted in printing.

[fol. 65] Citation, in usual form, showing service on Valentine K. Irion, filed March 30, 1926, omitted in printing.

[fol. 66] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY APPELLANT TO PRINT THE ENTIRE RECORD—Filed April 27, 1926

1. The Court below had jurisdiction.

2. The case comes properly under Section 266 of the Judicial Code.

3. The order of the Conservation Commissioner is unwarranted by law.

4. The order of the Conservation Commissioner is contrary to the Statutes and Constitution of Louisiana.

5. The order of the Conservation Commissioner is contrary to the Fourteenth Amendment of the Constitution of the United States.

6. The Statutes of Louisiana and particularly Act 252 of 1924 do not authorize the Conservation Commissioner to refuse permits for the manufacture of natural gas into carbon black by persons not theretofore engaged in such industry.

[fols. 67 & 68] 7. If the laws of Louisiana are construed as delegating to the Conservation Commissioner the right to refuse to grant permits for the manufacture of carbon black to those not theretofore engaged in such industry, then such laws are in violation of the Constitution of Louisiana and the Constitution of the United States.

8. An injunction to restrain the Conservation Commissioner and Attorney General of Louisiana from interfering with the use of complainant's property in the manufacture of natural gas into carbon black is the proper remedy to be pursued.

9. The right to proceed by mandamus in the State Court, if it exists, is not such an adequate remedy at law as to deprive complainant of his right to equitable relief in the Federal Court.

10. This is not a suit against the State of Louisiana within the meaning and intendment of the Eleventh Amendment to the Constitution of the United States.

All of the record is necessary for the consideration of the above points.

Saul, Ewing, Remick & Saul, John W. Davis, Attorneys for Appellant.

[fols. 69-72] AFFIDAVIT OF SERVICE—Filed April 29, 1926

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Allen S. Olmsted, 2nd, being duly sworn according to law deposes and says that he is of counsel for the appellant in the above-entitled case and that he served copies of the within statement of the points on which appellant intends to rely and of the parts of the record which he thinks necessary for the consideration thereof on the appellees by depositing a copy thereof, duly registered, in the mails of the United States, addressed to the said appellees.

Allen S. Olmsted, 2nd.

Sworn to and subscribed before me this 27th day of April, A. D. 1926. L. C. Sturtevant, Notary Public. Commission expires February 26th, 1927. (Seal of Laura C. Sturtevant, Notary Public, Philadelphia.)

[fol. 73] [File endorsement omitted.]

Endorsed on cover: File No. 31,844. E. Louisiana D. C. U. S. Term No. 339. J. Smylie Herkness, appellant, vs. Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, and Percy Saint, Attorney General of the State of Louisiana. Filed April 13th, 1926. File No. 31,844.

Original

Office Supreme Court, U. S.
FILED
OCT 4 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

No. [redacted] 3 -1

J. SMYLIE HERKNESS,

Appellant,

vs.

VALENTINE K. IRION, Commissioner of Conservation of the State of Louisiana, and PERCY SAINT, Attorney General of the State of Louisiana.

BRIEF FOR APPELLANT.

SAUL, EWING, REMICK & SAUL,
Solicitors for Complainant.

JOHN W. DAVIS,
MAURICE BOWER SAUL,
JOSEPH NEFF EWING,
ALLEN S. OLMSTED, 2d,
ESMOND PHELPS,
Of Counsel.

SUBJECT INDEX.

	PAGE
Reference to Opinion Below	1
Grounds of this Court's Jurisdiction	1
Statement of the Case	2
Specification of Assigned Errors Intended to be Urged.	6
Summary of Argument	7
Argument	8
I. The Court Below Had Jurisdiction and an Appeal Was Properly Allowed to This Court	8
II. The Case Comes Properly under Section 266 of the Judicial Code	9
III. The Order of the Conservation Commissioner is contrary to the Statutes and Constitution of Louisiana.	9
A. The Statutes of Louisiana Do Not Prohibit the Manufacture of Natural Gas into Carbon Black, Nor do Such Statutes Vest the Commissioner of Conservation With Power to Restrict Such Manufacture to Persons Already Engaged Therein, and to Refuse to Permit New Concerns to Engage in such Manufacture. On the Contrary, the Louisiana Statutes Expressly Accord the Right to All to Engage in Such Manufacture, Provided They Comply With the Conditions Imposed by Said Statutes.	11
B. If Act 91 of 1922 and Act 252 of 1924 Be Construed as Delegating to the Commissioner of Conservation the Right to Refuse Permits at Will or to Confine The Manufacture of Carbon Black to Those Then Engaged in That Industry, Then Said Acts Violate the Provisions of Article II of the Constitution of Louisiana of 1921, Prohibiting the Delegation of Legislative Power to the Executive Department	26

PAGE

IV. The Order of the Conservation Commissioner is Contrary to the Fourteenth Amendment 29

V. An Injunction to Restrain the Conservation Commissioner and Attorney General of Louisiana from Interfering with the Use of Complainant's Property in the Manufacture of Natural Gas into Carbon Black is the Proper Remedy to be Pursued 41

VI. The Right to Proceed by Mandamus in the State Court if it Exists, Is Not Such an Adequate Remedy at Law as to Deprive Complainant of his Right to Equitable Relief in the Federal Court 43

VII. This is not a Suit against the State of Louisiana within the Meaning and Intendment of the Eleventh Amendment to the Constitution of the United States.... 44

Conclusion. The Decree of the District Court Should Be Reversed and the Case Remanded for Further Proceedings 45

Appendix 46
Louisiana Act 250 of 1920 46
Louisiana Act 91 of 1922 49
Louisiana Act 134 of 1924 51
Louisiana Act 252 of 1924 52
Regulations of the Louisiana Department of Conservation, Rules 2, 29, 43 and 49..... 58

Table of Cases.

PAGE

Bodcaw Lumber Co. v. Cox, 159 La. , 106 So. 313... 30
Brown v. Spilman, 155 U. S. 665 30
Buder, Ex parte, 271 U. S. 461..... 9
Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94 .....2, 8, 10
Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109 43
Crowley, Town of, v. West, 52 La. Ann. 526, 27 So. 53.. 24
Dobbins v. Los Angeles, 195 U. S. 223 42
Dickson, State ex rel., v. Harrison, 161 La. 218, 108 So. 421 .....19, 22
Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207..... 30
Galle, State ex rel., v. New Orleans, 113 La. 371, 36 So. 999 .....19, 20, 38
Gas Products Co. v. Rankin, 63 Mont. 372, 207 Pac. 993 .....30, 35
Geer v. Connecticut, 161 U. S. 519 29
Gorieb v. Fox, 47 Sup. Ct. 675 39
Green v. Louisville & Interurban Ry. Co., 244 U. S. 499 .....2, 8, 10
Lincoln Gas Co. v. Lincoln, 250 U. S. 256 .....2, 10
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61....30, 32
Louisville & Nashville Ry. Co. v. Garrett, 231 U. S. 298 .....2, 10
Mandeville, Town of, v. Band, 111 La. 806, 35 So. 915 .....24, 25, 38
Miss. Mills vs. Cohen, 150 U. S. 202 43
Mississippi Mills v. Cohen, 150 U. S. 202 43
Moore v. Fidelity & Deposit Co., 272 U. S. 317..... 2, 9
Mutual Life Insurance Co. v. Boyle, 82 Fed. 705..... 41
New Orleans v. Palmisano, 146 La. 518, 83 So. 789 ....19, 21
Ohio Oil Co. v. Indiana, 177 U. S. 190 .....30, 31, 36
Ohio Tax Cases, 232 U. S. 576 .....2, 10

PAGE

Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229....30, 32
Oklahoma Gas Co. v. Russell, 261 U. S. 290 ..... 2, 8
Pennsylvania v. West Virginia, 262 U. S. 553 30
Pierce v. Society of Sisters, 268 U. S. 510 44
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.... 2, 8
Risty v. Chicago, R. I. & P. Ry. Co., 270 U. S. 378..... 10
Smith v. Wilson, 71 L. Ed. 415 ..... 2, 9
Smyth v. Ames, 169 U. S. 466 .....43, 44
State v. Billot, 154 La. 402, 97 So. 589 26
State v. Carson Carbon Co., 162 La., 781, 111 So. 162...15, 29
State v. Carter, 159 La. 121, 105 So. 247 40
State v. Mahner, 43 La. Ann. 496, 9 So. 480..... 19
State v. Thrift Oil & Gas Co., 162 La. 165, 110 So. 188 .....12, 15, 28, 29
Terrace v. Thompson, 263 U. S. 167 42
Towne v. Eisner, 245 U. S. 418 .....39, 44
Truax v. Raich, 239 U. S. 33 42,44
Waggoner Estate v. Wichita County, 273 U. S. 113....10, 30
Walls v. Midland Carbon Co., 254 U. S. 300 .....30, 31, 33
Watson v. Maryland, 218 U. S. 173 37
Westmoreland, etc. Gas Co. v. DeWitt, 130 Pa. 235.... 30
Yick Wo v. Hopkins, 118 U. S. 356 39
Young, Ex parte, 209 U. S. 123 .....42, 43

Table of Statutes.

Louisiana Act 250 of 1920, Session Laws 1920, p. 481.... 18
Louisiana Act 21 of 1922, Session Laws 1922, p. 170 .....11 et seq., 26, 38
Louisiana Act 252 of 1924, Session Laws 1924, p. 594 .....3, 11, 14, et seq., 26, 39
Louisiana Constitution of 1921, Article II, Sec. 1...26 et seq.
Louisiana Constitution of 1921, Article VI 11

PAGE

United States Judicial Code,
Sec. 238 as amended c. 229, sec. 1, 43 Stat. 936, 938 2
Sec. 265, c. 231, 36 Stat. 1162 ..... 8, 41
Sec. 266, as amended by c. 160, 37 Stat. 1013 and par. (3) sec. 1, c. 229, 43 Stat. 936, 938..... 1, 9

Other Material.

Department of Interior, Bureau of Mines, Bulletin 192, p. 1 4
Mineral Resources of the United States, 1926—Part II, pp. 13-16 ..... 4, 5, 35

Supreme Court of the United States

OCTOBER TERM, 1927

J. SMYLIE HERKNESS, Appellant, vs. VALENTINE K. IRION, Commissioner of Conservation of the State of Louisiana, and PERCY SAINT, Attorney General of the State of Louisiana.	No. 50

BRIEF FOR APPELLANT.

Reference to Opinion Below.

The opinion of the Court below by District Judge Burns (R., 31), is reported at 11 Federal (2d) 386.

The decree of the Court below was entered March 6, 1926 (R., 37-38).

Grounds of This Court's Jurisdiction.

The jurisdiction of the Federal Court was invoked by the complainant on the ground that the dispute arose under the Fourteenth Amendment, and on the ground of diversity of citizenship (R., 11). Complainant asked an interlocutory injunction against state officers, the Louisiana Commissioner of Conservation and the Attorney General. The District Court, finding that the case arose under Section 266 of the Judicial Code, ordered that the application for an injunc-

tion be heard before three judges (R., 16). Upon the hearing before this special tribunal, it was agreed that the Court might go on to final decree on the bill, answer and affidavit of complainant. The special tribunal, having thereupon dismissed the bill, granted an appeal to this Court (R., 45).

The jurisdiction of this Court is invoked under paragraph (3) of Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, §1, 43 Stat. 936, 938).

It is believed that the jurisdiction of this Court is sustained by:

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390;
Oklahoma Gas Co. v. *Russell*, 261 U. S. 296, 293;
Louisville & Nashville Ry. Co. v. *Garrett*, 231 U. S. 298;
Ohio Tax Cases, 232 U. S. 576, 586;
Green v. *Louisville & Interurban Ry. Co.*, 244 U. S. 499, 508;
Lincoln Gas Co. v. *Lincoln*, 250 U. S. 256, 264;
Chicago Great Western Ry. Co. v. *Kendall*, 266 U. S. 94, 97;
Moore v. *Fidelity & Deposit Co.*, 272 U. S. 317;
Smith v. *Wilson*, 71 L. Ed. 415.

Statement of the Case.

The complainant, Herkness, a citizen of Pennsylvania, is the owner in fee simple of 80 acres of land and of the natural gas rights under 760 contiguous acres, all in the Monroe Gas Field of Louisiana (R., 1-2). On this acreage, two producing gas wells, one on the fee simple tract, the other on the contiguous area, were drilled under state permit. Plaintiff bought the land and gas rights with these wells for $212,000 cash, with a view to manufacturing the gas into carbon black (R., 3). The property has no substantial value, unless used

for that purpose. The carbon black, when produced, was to be sold to the Johnson Company, a manufacturer of printing ink (R., 9).

The Laws of Louisiana and the Regulations of the Department of Conservation were asserted to require a manufacturer of carbon black to get a permit in advance from the Department. The complainant therefore applied to the defendant Irion, who is the Commissioner of Conservation, for a permit to erect a carbon black plant at his wells (R., 13). The application was proper in form under the statute; and the applicant was and is ready and willing to comply with all the statutory requirements relative to the manufacture of natural gas into carbon black (R., 24).

Dr. Irion, however, believes that the manufacture of natural gas into carbon black is wasteful, and that the gas could be used more efficiently and economically for industrial and domestic purposes (R., 20-21). Accordingly, in 1924, he inaugurated and publicly announced a policy of issuing no new permits for carbon black plants, and of gradually reducing the amount of natural gas which holders of old permits could utilize for that purpose (R., 22-23). Within a reasonable time, as his answer avers, he hopes completely to suppress the manufacture of carbon black in Louisiana (R., 23).

Pursuant to this policy Dr. Irion decided to refuse the complainant's application for a permit. He referred to the defendant Saint, the Attorney General of the State, the question of his legal authority to refuse the permit. The Attorney General advised him that he had full power to decline any further permits (R., 15). Dr. Irion therefore sent to complainant's attorney a copy of this opinion, "upon the strength of which your application is hereby respectfully denied" (R., 14).

Both the Attorney General and the Commissioner of Conservation informed complainant that they would use all legal means at their command to prevent his manufacture of carbon black without a permit (R., 18). By Statute (Section 8 of

Act 252 of 1924) one who violates an order of the Commissioner of Conservation promulgated by authority of that Act, which orders "are hereby declared to have the force and effect of statutory law", is guilty of a misdemeanor, and is subject to fines of from $100 to $10,000. Each day on which the violation occurs is a separate offense (R., 6), and three convictions within a period of two years are ground for ouster from the State.

Complainant thereupon applied to the District Court of the United States for an injunction restraining the defendant from interfering with the erection of a carbon black plant on complainant's land, or with the operation thereof, and restraining them from attempting to impose penalties for the erection or operation of the plant (R., 11).

The bill sets up the facts hereinabove summarized (R., 15) and also other facts concerning the production and use of carbon black. These facts may well be supplemented by others reported by the United States Bureau of Mines.

Carbon black is the product resulting from the incomplete combustion of gas deposited by contact of a flame upon a metallic surface.* 180,000,000 pounds were produced in the United States in 1926, of which 72 per cent. was produced in Louisiana. About half of this product was used in the rubber industry, about one-quarter was exported, and about one-eighth was used in the manufacture of ink.† The bill (filed in December, 1925) avers, and the answer does not deny, and complainant's affidavit also avers that a combination of carbon black manufacturers then in the Monroe field had recently been effected; that there was an agreement between these manufacturers and Dr. Irion that the total amount of gas used in the production of carbon black should not exceed an amount fixed in the agreement; that the distribution of that

(*) Department of the Interior, Bureau of Mines, Bulletin 192, page 1.

(†) "Carbon Black produced from natural gas in 1926". Mineral Resources of the United States, 1926—Part II-3, pages 13-16. Bureau of Mines.

amount was left to the manufacturers; and that no new permits were to be issued by Dr. Irion to persons who were not parties to the agreement (R., 9-10, 25). The Department of Mines reports that there were fewer producers in Louisiana in 1926 than in 1925, although the number of plants did not change.†

Inasmuch as carbon black is an essential ingredient of news ink, the Johnson Company, a long-established manufacturer of ink, must buy it, and Louisiana dominates the market. It will buy and use Louisiana carbon black in any event, but if complainant were not permitted to manufacture, it would have to buy from the combination at an enhanced price (R., 9). The bill avers that since the combination became effective, the price of carbon black has greatly increased (R., 9). The Bureau of Mines, in its report, remarks that "the decrease in average value in 1925 in the face of greatly increased demand and the increase in average value in 1926 in the face of decreased demand were interesting."†

The defendants, answering the bill, admitted the refusal to grant complainant a permit; averred that no permits had been granted to anyone for new plants since 1924, and claimed the right to discriminate between owners of existing plants and persons who desired to build new ones (R., 18-23). On this bill and answer and an affidavit of complainant given in lieu of testimony (R., 24-25) the case was heard. The parties agreed that the Court might go on to final decree (R., 30). The Court, consisting of Foster, Circuit Judge, and Grubb and Burns, District Judges, dismissed the bill (R., 37-38). Subsequently an appeal was allowed to this Court, and pending the determination of the appeal by this Court, the defendants were enjoined from interfering with the erection or operation of a carbon black plant on complainant's land, and from attempting to impose penalties on him for such operation (R., 45).

Specification of Assigned Errors Intended to Be Urged.

Appellant will rely on all of the assignments of error (R., 41-44). They involve eight points as follows:

1. The Court below had jurisdiction and an appeal was properly allowed to this Court.

2. The order of the Conservation Commissioner is contrary to the Statutes and Constitution of Louisiana.

3. The Statutes of Louisiana and particularly Act 252 of 1924 do not authorize the Conservation Commissioner to refuse permits for the manufacture of natural gas into carbon black by persons not theretofore engaged in such industry.

4. If the laws of Louisiana are construed as delegating to the Conservation Commissioner the right to refuse to grant permits for the manufacture of carbon black to those not theretofore engaged in such industry, then such laws are in violation of the Constitution of Louisiana and the Constitution of the United States.

5. The order of the Conservation Commissioner is contrary to the Fourteenth Amendment of the Constitution of the United States.

6. An injunction to restrain the Conservation Commissioner and Attorney General of Louisiana from interfering with the use of complainant's property in the manufacture of natural gas into carbon black is the proper remedy to be pursued.

7. The right to proceed by mandamus in the State Court, if it exists, is not such an adequate remedy at law as to deprive complainant of his right to equitable relief in the Federal Court.

8. This is not a suit against the State of Louisiana within the meaning and intendment of the Eleventh Amendment to the Constitution of the United States.

Summary of Argument.

The Conservation Statutes of Louisiana contemplate that the production of carbon black from natural gas shall be regulated, limited and controlled, but not prohibited. They do not authorize, either expressly or by implication, the Conservation Commissioner to prohibit at his discretion. If they did, there would be a delegation of legislative power contrary to the Louisiana constitution.

The order of the Conservation Commissioner which is complained of permitted owners of gas wells who had already built plants to engage in the manufacture of carbon black, but prohibited that manufacture to complainant, whose situation was the same as that of the other owners of gas wells except that he had not yet built a plant. Such an order cannot be sustained as a measure which conserves natural resources, because it does not conserve gas. It merely conserves the material and machinery which the newcomer desires to invest in his venture. Without limiting the aggregate quantity of gas consumed, it grants a monopoly to the owners of plants already built. Such a discrimination between those who have engaged in the business and those who desire to do so violates the Fourteenth Amendment.

Complainant, a citizen of Pennsylvania, who owns gas wells in Louisiana, is irreparably damaged by the discriminatory policy which the Conservation Commissioner is threatening to enforce against him. He has the right to invoke the protection of the Federal Courts. That power having been invoked, the Federal Court is bound to protect his rights by appropriate remedies. Not having the power to mandamus the State Commissioner to grant a permit for the erection of a plant or to grant any other adequate remedy at law, it should enjoin the Commissioner from interfering with the erection of the plant by the complainant without a permit or from imposing penalties on him for violating the Commissioner's order. A suit to restrain a State officer from

enforcing against complainant an illegal or unconstitutional order is not a suit against the State of Louisiana as contemplated by the Eleventh Amendment; it is a suit against the individuals. As the action to be enjoined threatens complainant's property rights, it does not come within Section 265 of the Judicial Code. The defendants should therefore be enjoined from interfering with complainant in the operation of his carbon black plant so long as he complies with the statutory requirements relative to its operation, or from invoking criminal penalties against him for operating it.

ARGUMENT.

I.

The Court Below Had Jurisdiction and an Appeal was Properly Allowed to this Court.

The Court's jurisdiction in this case appears so clear as to merit only a cursory discussion. There is diversity of citizenship and there is a question under the Fourteenth Amendment. The order of the Conservation Commissioner complained of, as the complainant contends, violates rights guaranteed to him by the Fourteenth Amendment. If the Louisiana Statute authorized the order complained of (as defendants assert and complainant denies), then the Statute is unconstitutional. Whether or not the unconstitutionality of the statute be pleaded, the contention that the order is unconstitutional gives the Court jurisdiction. *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 293. Recognizing the authority of the cited case, the Court below took jurisdiction (R., 34). See *Chicago, etc. Ry.* v. *Kendall*, 266 U. S. 94, 97. *Greene* v. *Louisville, etc. R. R. Co.*, 244 U. S. 499, 507. *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, 390.

II

The Case Comes Properly Under Section 266 of Judicial Code.

Finding that the case arose under Section 266 of the Judicial Code as amended, the District Court ordered that the application be heard before the special tribunal of three judges designated by that statute. The case was heard on bill and answer and an affidavit of the complainant in lieu of testimony. Inasmuch as the relief sought was an interlocutory injunction restraining the enforcement of an order of an administrative board, which purported to be made pursuant to the statutes of Louisiana, it is clear that Section 266 is applicable. The Court below therefore properly allowed an appeal directly to this Court (R., 44-46). The special statutory court was assembled and the hearing before it was had upon the application for a preliminary injunction; it was stipulated thereupon that the court might proceed without further stay to final decree (R., 30). This differentiates the case from *Smith* v. *Wilson*, 273 U. S. 388; 47 S. C. 385, and the hearing was before three judges, which differentiates it from *Moore* v. *Fidelity & Deposit Company*, 272 U. S. 317, and from *Ex parte Buder*, 271 U. S. 461.

III.

The order of the Conservation Commissioner is contrary to the Statutes and Constitution of Louisiana.

The Court below derived its jurisdiction over the controversy from the Federal question involved. Having taken jurisdiction, it owed the duty (to use its own language) to try the question whether a preliminary injunction should

issue (R., 34). But in performing that duty it assumed that it was "concerned only with violations of the Federal Constitution" (R., 34). It therefore did not discuss and presumably did not consider, the illegality of the order under the state statutes and constitution.

This we submit was clear error. Regardless of the source of its jurisdiction, the Court should have determined all of the questions involved, whether arising under State Statutes or the Federal Constitution. *Louisville & Nashville Railway Co.* v. *Garrett*, 231 U. S. 298; *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116; *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 264; *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U. S. 94, 97; *Green* v. *Louisville & Interurban Ry. Co.*, 244 U. S. 499, 508; *Ohio Tax Cases*, 232 U. S. 576, 586; *Risty* v. *Chicago, etc., Ry.*, 270 U. S. 378, 387. Here, as in the case last mentioned, the constitutional questions raised are "questions of substance and sufficient to give the Court jurisdiction to pass on the whole case." If we are correct in our views however this case may well turn, as that case did, on the construction and application of the State law, and without requiring the determination of the federal question. In that case the legality, under the State Statute, of the orders complained of, had at least been before the State Court in other proceedings, although not definitely decided there. In this case the order of the Commissioner of Conservation has never been considered by a State Court. This case therefore affords an application even clearer than the *Risty* case itself of the rule therein stated, viz., that "It is the duty of the Federal Courts, in suits brought in or removed to the District Courts, to decide for themselves all relevant questions of State law." *Risty* v. *Chicago, etc., Ry., supra*, page 387.

Accordingly we turn to the constitution and laws of Louisiana to learn whether the action complained of is warranted by law. It is submitted that it is not.

A. THE STATUTES OF LOUISIANA DO NOT PROHIBIT THE MANUFACTURE OF NATURAL GAS INTO CARBON BLACK, NOR DO SUCH STATUTES VEST THE COMMISSIONER OF CONSERVATION WITH POWER TO RESTRICT SUCH MANUFACTURE TO PERSONS ALREADY ENGAGED THEREIN, AND TO REFUSE TO PERMIT NEW CONCERNS TO ENGAGE IN SUCH MANUFACTURE. ON THE CONTRARY, THE LOUISIANA STATUTES EXPRESSLY ACCORD THE RIGHT TO ALL TO ENGAGE IN SUCH MANUFACTURE, PROVIDED THEY COMPLY WITH THE CONDITIONS IMPOSED BY SAID STATUTES.

Section 1 of Article VI. of the Constitution of Louisiana of 1921, provides:

> "The natural resources of the State shall be protected, conserved and replenished, and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The Department of Conservation shall be directed and controlled by a Commissioner of Conservation to be appointed as elsewhere provided in this Constitution, *who shall have and exercise such authority and powers as may be prescribed by law.* The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State and to prohibit and prevent the waste or any wasteful use thereof."

Pursuant to this Constitutional authority, the Legislature of Louisiana has passed two statutes concerning the use of natural gas in the manufacture of carbon black, viz: Act 91 of 1922 and Act 252 of 1924 the relevant portions of which are printed in an Appendix to this brief. Section 10 of the Act of 1924 provides that "this Act shall be cumulative of and in addition to the laws of this State, which are not in direct conflict with the provisions hereof." Section 11 of said Act provides that "the authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other Act

of this State, but shall be cumulative and in aid thereof." The Act of 1924 contains no repealing clause.

The Supreme Court of Louisiana, in the recent case of *State* vs. *Thrift Oil & Gas Co.*, 162 La., 165, 110 So. 188, held that the effect of these provisions was to incorporate the Act of 1922 into the Act of 1924 and make the former Act in substance a Section of the latter Act. The Court said (p. 193):

> "The Act of 1924 was intended to be, and is, the paramount statute regulating the production of natural gas in this state. 'This act shall be cumulative of and in addition to all the laws of this state which are not in direct conflict with the provisions hereof.' Section 10. Hence all laws on the same subject-matter, and not in conflict with this act, are by this clause incorporated into this statute and made part thereof as fully as if set forth, in full therein. So that Act 91 of 1922 is, as it were, a mere section of the act of 1924."

Section 1 of Act 91 of 1922 provides:

> "That natural gas may be used in the manufacture of carbon black under the conditions as fixed and imposed by the provisions of this Act."

Here is a clear and unequivocal legislative declaration legalizing the use of natural gas in the manufacture of carbon black by any and all persons. The sole condition attached thereto is that the other provisions of the Act must not be violated.

We turn now to the other provisions of the Act of 1922 and to the provisions of the Act of 1924 to ascertain whether this strong declaration of legislative policy has been so devitalized and nullified as to clothe the Commissioner of Conservation with the dictatorial power to prohibit such persons as he may see fit from engaging in this legal industry.

Section 2 of Act 91 of 1922 provides:

> "That the Commissioner of Conservation is authorized, directed and empowered to fix and determine on

the 1st day of October, 1922, and semi-annually thereafter, what percentage of consumption of natural gas produced by each gas well may be used in the manufacture of carbon black, said percentage of consumption to be based upon the potential capacity of such gas well, and which percentage shall not be less than fifteen per cent and not more than twenty per cent of the potential capacity of such well, provided that in fixing such basis of consumption the same rule, as far as possible, shall be applied to all gas wells in any producing gas area, and provided further, that the percentage of consumption may be increased in any particular well when the safety of such well may demand such increase."

Section 3 of said Act reads as follows:

"That the Commissioner of Conservation is authorized, empowered, directed and required to reduce the consumption of natural gas used in the manufacture of carbon black below the minimum fixed in Section 2 of this Act, after promulgation for sixty days of an order to that effect, whenever it is actually necessary to do so in obtaining an adequate supply of natural gas for domestic heating and lighting purposes in the State of Louisiana, and for manufacturing plants, industries and enterprises located and operated within the State of Louisiana, provided that the conditions set out in this Section shall not become effective until such time as the establishment of factories, industrial plants and enterprises, the construction of pipe-lines in the State of Louisiana, and domestic consumers in Louisiana, or any one of such shall provide a demand which necessitates the enforcement of the same."

Section 4 prohibits the use of natural gas for the manufacture of carbon black without extracting and saving therefrom the gasoline contained therein.

Section 5 authorizes the Commissioner of Conservation "to make, adopt and promulgate rules and regulations which, in his judgment may be necessary for the proper carrying out of the provisions of this Act."

Section 6 makes it the duty of the Commissioner to enforce the provisions of the Act and the rules and regulations adopted by him; and Section 7 makes it the duty of the Department of Justice to represent said Commissioner in the enforcement of said Act, and of the rules and regulations adopted by said Commission.

Section 8 makes it a misdemeanor to violate the provisions of the Act or the orders of the Commissioner, and provides that each day of violation shall constitute a separate offense and subject the offender to a separate penalty, and that three convictions shall subject the offender to a forfeiture of the right to manufacture natural gas into carbon black.

It thus appears that there is nothing whatever in the later sections of the Act of 1922 to nullify the provisions of the first section that "natural gas may be used in the manufacture of carbon black." Certainly nothing to that effect can be found in the second section, which expressly prohibits the Commissioner of Conservation from fixing any lower percentage than fifteen per cent of the potential capacity of each gas well as the percentage that may be used in the manufacture of carbon black. On the contrary, this section expressly recognizes the right to use at least fifteen per cent of such potential capacity in such manufacture. Section 3 cannot be invoked, as it is not claimed that the emergency contemplated therein has arisen or that the Commissioner of Conservation has promulgated the order required thereby as a condition precedent to said section becoming effective. Nor can it be said that the authority granted to the Commissioner of Conservation by Section 4, to make rules and regulations "necessary for the proper carrying out of the provisions of this Act," vests this officer with the power to nullify Sections 1 and 2 of the Act and to absolutely prohibit the use of natural gas in the manufacture of carbon black.

Let us now examine the provisions of the Act of 1924 and ascertain whether they have wiped out Sections 1 and 2 of the Act of 1922.

One of the numerous objects expressed in the title of Act 252 of 1924 is "to define the conditions under which natural gas can be burned into carbon black." Surely the title of this Act does not evince any intent to prohibit the use of natural gas in the manufacture of carbon black, but instead clearly indicates that such manufacture is to be permitted under certain well-defined conditions.

Section 1 of the Act prohibits the production of natural gas "in such manner and under such conditions as to constitute waste"; but in defining the term "waste," it in no way relates it to the manufacture of carbon black.

Section 2 provides minute rules for "drilling for, producing, taking, transporting, piping and using gas in this State."

Section 3 provides "the percentage of the open flow capacity that gas wells may be allowed to produce or that may be drawn from each gas well." This percentage varies according to the acreage of the tract on which the well is drilled. There is, however, a proviso that "where the percentages hereinabove provided applied to any well reduces the amount allowed below one million cubic feet, there may be taken from such well a total of one million cubic feet, provided the back pressure as elsewhere herein provided for shall be maintained." This Section further provides "that the percentage of the open flow capacity of each well as fixed in this Section, depending on location, shall not apply to any well or wells heretofore drilled or to a well or wells the drilling of which was commenced on or before June 24, 1924." The Supreme Court of Louisiana has ruled that the effect of the last two provisos is that a well drilled prior to June 24, 1924, "may still take at least the same percentage of gas as it might have taken under the Act of 1922" (i. e., not less than fifteen nor more than twenty per cent.), but can in any event take at least one million cubic feet of gas if the back pressure is maintained. (*State* v. *Thrift Oil & Gas Co.*, 162 La., 165, 194; *State* v. *Carson Carbon Co.*, 162 La., 781, 791, 111 So. 162.)

Section 4 provides that "the Commissioner of Conservation shall determine in accordance with the above rules the allowable percentage that each gas well may produce."

Section 5 of said Act provides:

> "The Commissioner of Conservation may grant permits for the building of plants to burn natural gas into carbon black under the conditions and provisions of Act 91 of 1922, except that the percentage of the open flow of gas wells that may be utilized in burning carbon black shall be controlled by this Act, when the production of such well is controlled by this Act and by Act 91 of 1922, when the percentage that such wells may produce is controlled by said Act 91 of 1922. Such permits shall only be granted to bona fide applicants and which permits shall automatically expire one year after date of issue."

It is further provided in said Section that

> "no permit shall be granted, and the Commissioner of Conservation is without authority to grant a permit for the construction of a new carbon black plant, except upon written application on forms prepared by the Department of Conservation in which application the applicant shall state that he, they or it, will fully and completely abide by and comply with all of the provisions of this Act and with all the rules and regulations of the Commissioner of Conservation established under the provisions of this Act."

It is undisputed that the application tendered by the complainant complied in all respects with the requirements of this section.

Section 6 makes it the duty of the Commissioner of Conservation "to make and enforce rules and regulations for the conservation of the gas of this State, not in conflict herewith."

Section 7 authorizes the Commissioner of Conservation to hire expert help to enforce the provisions of the Act.

Section 8 makes the violation of the rules of the Commissioner of Conservation promulgated under the authority of

the Act a misdemeanor punishable by fine of not less than one hundred dollars nor more than ten thousand dollars, and provides that each day of violation shall constitute a separate offense, and that three convictions for willful violations of the Act, where the second violation succeeds a first conviction and the third violation succeeds a second conviction shall subject the offender to the forfeiture of his right to do business in the State.

Section 9 makes it the duty of the Attorney General and District Attorneys to enforce the Act and fixes the venue of criminal prosecutions thereunder.

Section 10 provides that "this act shall be cumulative of and in addition to all the laws of this State, which are not in direct conflict with the provisions hereof."

Section 11 provides:

> "The authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other act of this State, but shall be cumulative and in aid thereof."

Section 12 provides the remedy against corporations violating the provisions of the Act.

Section 13 defines certain words and phrases as used in the Act.

Surely, none of the provisions of the Act of 1924 have nullified the declaration of the Act of 1922 that "natural gas may be used in the manufacture of carbon black." It was certainly never intended by this Act to permit the Commissioner of Conservation to confine this important industry to persons already engaged therein, and to bar all new-comers. Indeed, Section 5 of the Act itself contemplates that the Commissioner should grant permits "for the construction of a new carbon black plant;" and the only condition attached to the granting of such a permit is that "the applicant shall state that he, they, or it, will fully and completely abide by and comply with all of the provisions of this Act

and with all the rules and regulations of the Commissioner of Conservation established under the provisions of this Act." Nor was it ever contemplated that the Commissioner should have the right to grant or refuse permits according to his whim or caprice, and even if the statutes could conceivably be construed as vesting him with any discretion in the issuance of permits, by the express terms of Act 134 of 1924 (Appendix, p. 50) he is forbidden to exercise such discretion except upon the approval of the Attorney-General and the Governor. The defendant Commissioner did consult the Attorney-General but it is nowhere pretended that the Governor of Louisiana has approved the course the Commissioner is pursuing. But as has already been shown it is inconceivable that any discretion in the issuance of permits was given the Commissioner by the statutes. On the contrary, Section 11, out of an abundance of caution, expressly restricts the authority of this officer by providing that:

> "The authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other act of this State, but shall be cumulative and in aid thereof."

In his opinion to Commissioner Irion, Attorney General Saint refers to the provisions of Act 250 of 1920, which is also printed in our Appendix. We fail to see what bearing that Act has. It was undoubtedly repealed by implication by the passage of the Acts of 1922 and 1924, as the entire subject matter of the Act of 1920 is covered by these later Acts. Moreover, the Act of 1920 does not purport to prohibit the manufacture of natural gas into carbon black, either by those then engaged therein or by those that may thereafter engage therein, nor does it even require that the persons engaging in such industry must obtain permits from the Commissioner of Conservation. The Act merely vests the Department of Conservation with "supervision over the production and use of natural gas in connection with

the manufacture of carbon black," and vests the Commissioner of Conservation with power to adopt "all necessary and reasonable rules and regulations providing for the conservation of natural gas produced for and used in plants manufacturing carbon black." (Section 3.) The Act clearly recognizes the production of natural gas and its manufacture into carbon black as legal, and does not attempt to confer upon the Commissioner of Conservation any power to prohibit the same, but merely confers upon him the right to make reasonable rules and regulations covering such production and manufacture.

We submit that it is clear that the laws of Louisiana not only do not prohibit the manufacture of natural gas into carbon black, but expressly recognize and contemplate such manufacture. It would certainly require the clearest language to evince a legislative intent to make unlawful a business theretofore undoubtedly lawful, engaged in by a large number of persons, and in no sense obnoxious to the public morals, health or welfare, or, while permitting its pursuit to an existing class, to bar from it all others who might thereafter desire to engage therein.

The statutes grant no implied power, express or implied, to the Commissioner to suppress the manufacture of carbon black altogether. Still less can they be construed as vesting him with discretionary power to prohibit the manufacture to some while permitting it to others. That such a power cannot be left to the arbitrary will of an administrative officer has been repeatedly held by the Supreme Court of Louisiana. *State of Louisiana* v. *Mahner*, 43 La. Ann. 496; 9 So. 480. *State ex rel. Galle* v. *New Orleans*, 113 La. 371; 36 So. 999. *New Orleans* v. *Palmisano*, 146 La. 518; 83 So. 789, *State ex rel. Dickson* v. *Harrison*, 161 La. 218; 108 So. 421.

In the case of *State of Louisiana* vs. *Mahner*, 43 La. Ann. 496, 9 So. 480, the court held that an ordinance prohibiting dairies within certain designated limits is not general in

its operations among the class it is intended to effect, and is therefore void. The court said:

> "The ordinance is not general in its operation. It does not affect all citizens alike who follow the same occupation which it attempts to regulate. It is only those persons who keep more than two cows within the prohibited limits without the permission of the City Council who are subject to the penalties in the ordinance. The discretion vested by the ordinance in the City Council is in no way regulated or controlled. There are no conditions prescribed upon which the permit may be granted. It is within the power of the City Council to grant the privilege to some, to deny it to others.
>
> "The discretion vested in the Council is purely arbitrary. It may be exercised in the interest of a favored few. It may be controlled by partisan considerations and race prejudices, or by personal animosities. It lays down no rules by which its impartial execution can be secured, or partiality, and oppression prevented. Yick Wo vs. Hopkins, 118 U. S. 356 (6 Sup. Ct. 1064, 30 L. Ed. 220; Horr & Bemis M. P. Ordinances, paragraphs 136, 136)."

In the case of *State ex rel Galle* vs. *City of New Orleans*, 113 La., 371, 36 So. 999, the court granted a mandamus against the city of New Orleans, commanding it to grant to the relator the right to carry on and operate a barroom. The court said (p. 382):

> "The case at bar differs from some of those which have been cited, in that they concerned harmless callings, whilst that in which the relator proposes to engage is usually regarded as pernicious. That fact, no doubt, furnishes a sufficient reason for discriminating against the calling, but it affords no justification for discriminating between persons similarly situated who may be or may desire to become engaged in that calling. The relator occupies the same relation to any other barkeeper that the trade of the barber does to that of the baker, and the principle applied as between the two trades is equally applicable as between the two individuals engaged in the same business or trade. A statute of this State

imposing conditions upon the business of selling intoxicating liquors, although such conditions be more onerous than those imposed upon another business, may be sustained because the business of selling intoxicating liquors more seriously affects the health, morals, and general welfare of the public than another business, but where, as in this case, the state legalizes the business of selling liquors, and an individual citizen is denied the right to engage in it in a place and under conditions where and under which others having no better qualifications than he are so engaged, the law, if any there be, authorizing such denial, has no just foundation in reason or in the police power of the state, for it deprives one citizen of the right to earn his livelihood by means of a lawful calling, whilst according that right to others similarly situated, and, in so doing, deprives him of the equal protection of the law, and of his liberty, without due process of law, and oversteps those restrictions upon legislation which are said to be inherent in the nature of American institutions."

In the case of *City of New Orleans* vs. *Palmisano*, 146 La. 518, 83 So. 789, the court held invalid an ordinance of the City of New Orleans, requiring a permit for the operation of portable gas tanks on the streets of the city, without prescribing any terms or conditions on compliance with which a permit would be granted or without which it should be withheld. The court said (pp. 521-22):

"The objection to the ordinance in question, however, is not that the police power of the municipality does not extend to the regulation of the sale of gasoline, or to the control and regulation of the use of the public thoroughfares for a private business. The objection is that the ordinance does not recognize the constitutional right of every citizen to the equal protection of the laws; that is, the ordinance does not guarantee or recognize that every citizen is entitled to stand before the law on equal terms with any and all others in a like situation, bearing the same burdens that are imposed upon all others in the same situation.

"The objectionable feature, which in our opinion makes the ordinance void, is that it does not prescribe any terms or conditions upon compliance with which a permit shall be withheld. Whether the ordinance was or was not intended to confer, it does in fact confer, upon the commission council, the arbitrary power to grant the permission to one and withhold it from another citizen in a like situation, to conduct what the ordinance concedes to be a legitimate business. It does not restrict the commission council to a legal discretion to be exercised upon consideration of the circumstances of each case. In fact, the ordinance recognizes that the business was being conducted on the sidewalks or thoroughfares of the city when the ordinance was enacted; and, whatever the purpose was, the effect was to give the commission council arbitrary power to leave any person, firm, or corporation in the business, and to the advantage of the favored persons or firms or corporations, to put others, in a like situation, out of the business. An ordinance that purports to confer upon any officer or tribunal the arbitrary control over all citizens in the exercise of a legitimate occupation or business, and to deprive all citizens in a like situation of the right to equal protection in such occupation or business, is not a law, but an attempt to make the arbiter in such case a law in himself."

In the recent case of *State ex rel. Dickson* v. *Harrison*, 161 La., 218, 108 So. 421, the court held discriminatory and unconstitutional an ordinance prohibiting the erection of business buildings within residential zones, save in those instances where special permission was granted by the City Council, on the ground that the ordinance prescribed no uniform rule of action applicable to all similarly situated, but left the matter to the whim and fancy of the city council. The court said (p. 221):

"Plaintiff contends that the reservation as to the granting of permits in each separate instance, by special ordinance, on application made, makes the ordinance discriminatory and unconstitutional. In State v. Carter, 159 La. 121, 105 So. 247, we said:

"'A statute or an ordinance which, instead of prescribing a uniform rule of action, undertakes to vest in a public officer or commission the authority to discriminate in favor of or against persons engaged in a legitimate business or occupation or enjoying a common right by granting or withholding a license or permit or approval, arbitrarily, or according to the officer's or commission's favoritism or whim, is violative of the equal protection clause of the Fourteenth Amendment (referring to the Constitution of the United States). Yick Wo v. Hopkins, Sheriff, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; State v. Mahner, 43 La. Ann. 496, 9 So. 480; State v. Dubarry, 44 La. Ann. 1119, 11 So. 718; State v. Kuntz, 47 La. Ann. 107, 16 So. 651; City of New Orleans v. Palmisano, 146 La. 518, 83 So. 244, 12 A. L. R. 1436.'"

"In the case at bar the council does not seek to confer upon another the power to grant or withhold permits, but, instead, reserves that power to itself, or, in other words, the council, by the ordinance, seeks, as it were, to confer power upon itself to grant or withhold permits. But that difference between the case at bar and the Carter case, from which the foregoing excerpt is taken, is immaterial. See State v. Mahner, 43 La. Ann. 496, 9 So. 480, and Hagerstown v. Baltimore & Ohio R. Co., 107 Md. 178, 68 A. 490, 126 Am. St. Rep. 382. What makes the ordinance objectionable is that it prescribes no uniform rule of action, applicable to all similarly situated, under which the council is to act in granting or withholding permits, but leaves it to the whim and fancy of the council to grant or withhold them. In our opinion the ordinance, because of this objectionable feature, which we think affects it in its entirety, is unconstitutional. We cannot separate the objectionable feature from the rest of the ordinance without making it a materially different enactment, and hence the entire ordinance must fall."

The defendant Irion will contend, perhaps, that his discrimination between persons whom he permits to manufacture carbon black and those to whom he attempts to prohibit the manufacture is not arbitrary, but is based on rea-

sonable principles of classification, viz., that those who have already embarked in the business will be permitted to continue while those who have not yet begun will be prevented from starting. No such principle of classification is laid down in the statute, and as will be pointed out later, it is not a reasonable classification anyhow. It is, moreover, definitely disapproved on authority in Louisiana. *Town of Crowley* v. *West*, 52 La. Ann. 526; 27 So. 53. *Town of Mandeville* v. *Band*, 111 La. 806; 35 So. 915.

The case of *Town of Crowley* vs. *West*, 52 La. Ann. 526, 27 So. 53, involved the validity of a city ordinance making unlawful the establishment or operation of livery stables within the corporate limits, and providing that said ordinance should not apply to livery stables already in existence. The court said (p. 533):

> "We have, then, a case in which it appears that a person engaged in a business which is conceded to be lawful, in which four other persons or firms are engaged, in the same town, and which, so far as the record discloses, is conducted properly and inoffensively, is nevertheless, by the operation of a municipal ordinance, arrested and fined because he has failed to establish his said business in a part of the town remote from the business center, rather than at the place which he considers most advantageous; that it further appears that the other four persons or firms engaged in the same business are not, to be affected by the ordinance, but are to be permitted to conduct their business where they please, and that it naturally pleases them to remain in the central part of the town, from which the defendant is to be permanently excluded. The proposition that the defendant can be thus discriminated against, and that his four competitors in business can be thus secured the monopoly in perpetuity of the livery stable business in Crowley, cannot be seriously entertained. State vs. Mahner, 43 La. Ann. 496, 9 South. 480; State vs. Dulaney, 43 La. Ann. 500, 9 South. 481; State vs. Garibaldi, 44 La. Ann. 814; 11 South. 36; State vs. Sarradat, 46 La. Ann. 703, 15 South. 87, 24 L. R. A. 584; State vs. Kuntz, 47 La. Ann. 107, 16 South. 652; Tugman vs. City of Chicago, 78 Ill. 409; Dill. Mun. Corp. (4th Ed., par. 322)."

In the case of *Town of Mandeville* vs. *Band*, 111 La. 806, 35 So. 915, the court held invalid the ordinance of the town which permitted the continuance of liquor saloons therein, but provided that no new saloons should be opened, unless a petition was filed with the commission council, and no opposition was made thereto within a certain time. The court said:

> "In the second place, we feel quite confident in the correctness of the conclusion that an ordinance should not discriminate in favor of anyone. Drawn as it is in this case, the ordinance would have the effect of permitting the fortunate few who are conducting the saloon business within the designated limits to continue unmolested with their business, while the less fortunate, who come after, are excluded."
>
> "It is well settled in matter of municipal regulation that a person engaged in a particular business in a particular locality is not to be advantaged by an ordinance to permit him to continue his business, whilst others are forbidden from carrying on the same business."
>
> "Principle very similar was laid down in Town of Crowley vs. West, 52 La. Ann. 527, 27 South. 53, 47 L. R. A. 652, 78 Rm. St. Rep. 355, following the leading case of Yick Wo vs. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.
>
> "The ordinance in this case does not apply to all alike, and it does discriminate as to time. It provides, in effect, that from the year 1902, no saloon shall be kept within certain limits, while it leaves free to carry on the business those who were within time limits. The ordinance, in effect, provides that hereafter it shall be unlawful to 'establish or set up a drinking house.'"

B. If Act 91 of 1922 and Act 252 of 1924 Be Construed as Delegating to the Commissioner of Conservation the Right to Refuse Permits at Will or to Confine the Manufacture of Carbon Black to Those Then Engaged in That Industry, Then Said Acts Violate the Provisions of Article II of the Constitution of Louisiana of 1921, Prohibiting the Delegation of Legislative Power to the Executive Department.

A further objection to the construction which defendants seek to place on the Conservation Statutes is that if so construed the Conservation Statutes are such a delegation of legislative power as is forbidden by the Louisiana Constitution. This conclusion follows, it is submitted, from the decision of the Supreme Court of Louisiana in *State* v. *Billot*, 154 La. 402; 97 So. 589. The court there held that the provision of Section 4 of Act 204 of 1912, authorizing the Conservation Commission to fix the open season for killing deer, but requiring that such season should not be less than two nor more than five months, was void because it delegated legislative power in violation of Article II of the Constitution of 1921. The court said (p. 403):

> "Neither of the acts fix a definite open season for the hunting of deer or a definite closed season during which deer shall not be killed. Section 4 of Act 204 of 1912 provides for an open season not exceeding five months in any one year, and it definitely fixes the months of November and December as two of the months of the open season. With reference to the other months of the open season, of the beginning and end of the duration thereof, the act vests the conservation commission with the power and authority to determine and fix or vary it as may best suit the conditions of the several parishes.
>
> "Vesting the conservation commission with this power and authority is clearly a grant of legislative power.
>
> "The conservation commission is a branch of the executive department of the state government. Article 5 of the Constitution of 1921 is, in part, as follows:

"'Section 1. The executive department shall consist of a Governor, Lieutenant Governor, Auditor, Treasurer, Secretary of State, Register of the Land Office, Commissioner of Agriculture and Immigration, and Commissioner of Conservation.'

"Article 2 of the Constitution of 1921, which is the same, in substance, as articles 16 and 17 of the Constition of 1898, is as follows:

"'Section 1. The powers of the government of the state of Louisiana shall be divided into three distinct departments—legislative, executive and judicial.

"'Section 2. No one of these departments nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.'

"The framers of the Constitution never intended that the Legislature should delegate any of its legislative powers to the conservation commission, and this intention is unequivocally expressed in section 1 of article 6 of the Constitution of 1921.

"'Section 1. The natural resources of the state shall be protected, conserved and replenished; and for that purpose shall be placed under a department of conservation, which is hereby created and established. The department of conservation shall be directed and controlled by a commissioner of conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the state, and to prohibit and prevent the waste or any wasteful use thereof.'

"The intention expressed is clear.

"'The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the state.'

"As the Legislature has not fixed an open season in which wild deer may be killed or a closed season in which they may not be hunted, it follows that no statute

> of the state has been violated, and, as the Legislature could not vest the conservation commission with legislative power, the indictment against the accused must fall."

If, as held in the Billot case, the Legislature of Louisiana cannot delegate to the Commissioner of Conservation the right to fix the open season for wild deer, then it certainly follows that such Legislature cannot delegate to the same officer the right to legislate as to whether or not the carbon black industry shall be confined to those persons now engaged therein.

In the case of *State* v. *Thrift Oil Company*, 162 La. 166; 110 So. 88, the Supreme Court of Louisiana has had before it the question whether or not Section 2 of Act 91 of 1922 contains an unconstitutional delegation of power. This is the section which authorizes the Commissioner to fix the percentage of gas from each well which may be used in the manufacture of carbon black. The statute prescribes a maximum of 20 per cent and a minimum of 15 per cent of the potential capacity of the well. The court found it unnecessary, however, to determine the constitutional question thus raised.

The Thrift Oil and Gas Company was convicted for an overdraft of gas in violation of Acts 91 of 1922 and 252 of 1924. One of the defenses was that the provision of Section 2 of Act 91 of 1921, granting to the Commissioner of Conservation the authority to fix the percentage of gas to be used in the manufacture of carbon black at not less than fifteen nor more than twenty per cent., violated the prohibition of Article II of the Constitution of 1921 against the delegation of legislative power. The court, on the first hearing, affirmed the conviction and rejected this contention of appellant. On rehearing, however, the conviction was set aside; and the court specifically held that it was unnecessary to pass upon this constitutional question, as the appellant was entitled, under Act 252 of 1924, to take gas in excess of the

quantity that it had actually taken (p. 194). The *Thrift Oil* case is, therefore, no authority against our position; indeed, even the opinion handed down on the first hearing stressed the fact that "the Legislature has been careful not to leave the fixing of the percentage of gas to be used from wells to the mere arbitrary discretion of the Commissioner of Conservation" (p. 170). In any event, the decision could hardly determine the question for the reason that the Commissioner had fixed the percentage at the legal maximum of twenty per cent., *State* vs. *Carson Carbon Co.*, 162 La. 781; 111 So. 162.

There may be some doubt as to whether the Legislature could not delegate to the Commissioner of Conservation the right to fix within specified limits, the amount of gas to be taken. There can, however, be no question that the Legislature cannot delegate to the Commissioner of Conservation the right to decide whether the carbon black industry should be abolished, or whether it should be confined to those already engaged therein. This would clearly be a delegation of legislative power and would fall within the prohibition of Article II of the Constitution of 1921.

IV.

The order of the Conservation Commissioner is contrary to the Fourteenth Amendment.

At the very outset of the discussion of plaintiff's rights under the Fourteenth Amendment, he is met by the specious argument, advanced on brief in the court below, that his gas rights are not property at all, and so are not protected by the amendment. Under the law of Louisiana, say the defendants, gas in place belongs to the state, so that the owner of the surface has no property right to be protected.

The argument is patently fallacious. If the state owned the gas, it could prohibit its export, as it can prohibit the export of game. *Geer* vs. *Connecticut*, 161 U. S. 519. But

that it cannot prohibit, or restrict, the export of gas from its borders is clear. *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Pennsylvania* v. *West Virginia*, 262 U. S. 553. While because of its peculiar character, the police power of the State may extend to the regulation of the production or use of the gas (*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190), it by no means follows that the State is the owner of the gas it regulates. The doctrine that minerals, whether precious or otherwise, are the property of the sovereign has never obtained in Louisiana, or, for that matter, in the United States.

There is no basis in the law of Louisiana for any such conclusion. True, Louisiana does not adopt the view, held in some states, that the owner of the surface *owns* in severalty the oil and gas under it. *Brown* v. *Spilman*, 155 U. S. 665, 670; *Westmoreland, etc., Natural Gas Co.* v. *DeWitt*, 130 Pa. 235, 249; *Gas Products Co.* v. *Rankin*, 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294. Louisiana adopts the more generaly accepted view that the owner of the surface has "the right to extract such minerals from the soil," as from a common reservoir, excluding others from exercising a like right on his premises. *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 150 La. 756, 858; 91 So. 207. Whether this right be denominated an incorporeal right, a real right or a servitude, whether it be realty or personalty, it is in any case *property*. *Bodcaw Lumber Co.* v. *Cox*, 159 La., 106 So. 313. *Waggoner Est.* v. *Wichita County, supra*. When the gas itself is reduced to possession, as by drilling a well to and into the producing sand, title vests as fully as in the case of any other property. In the leading case on the subject, *Frost-Johnson Lumber Co.* vs. *Salling's Heirs, supra*, page 858, the Supreme Court of Louisiana notes "with much satisfaction" that with regard to the nature of oil and gas rights "our jurisdiction is in complete harmony with that which prevails throughout the land," citing *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, and *Walls* v. *Midland Carbon Co.*, 254 U.

S. 300. So much for the contention that the law of Louisiana is peculiar and whittles the plaintiff's gas rights down to something so small that the Fourteenth Amendment cannot see them.

That this right, like other property rights, can be curtailed by the state in the exercise of its police power is, of course, conceded. *Ohio Oil Co.* v. *Indiana, supra; Walls* v. *Midland Carbon Co., supra.* The question is the kind, as well as the extent, of impairment, which is allowable. The answer to this question involves a discussion of the grounds on which the impairment is permitted. And any such discussion properly centers around *Ohio Oil Co.* v. *Indiana, supra.*

That case concerned the constitutionality of the Indiana statute, prohibiting the owners of gas or oil wells from permitting the gas to escape into the open air. The court sustained the statute, as a measure of protection to the owners of the rights in the gas, considered collectively. Mr. Justice White, announcing the opinion of the court, expounded the nature of the rights involved. The surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath.

But the nature of gas is such that the use of his right by one surface owner may result in his obtaining an undue proportion of the common fund of gas, to the detriment, or even annihilation of the rights of the others. The legislature, therefore, has the right to protect all of the collective owners against the depredations of some, in order to secure "just distribution to arise from the enjoyment by them of their privilege to reduce to possession." "Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana, which is here attacked because it is asserted that it divested private property without due compensation, in substance is a statute protecting private property and preventing it from being taken by one of the common owners, without regard to the enjoyment of the others."

Mark the contrast between the Indiana Statute and Dr. Irion's order. The Indiana statute forbids waste by anyone who has a right to take from a common source of supply, and thus protects the others who have a coequal right. Dr. Irion denies the coequal right of each; he purposes to prohibit to one the identical use of the right (be it considered a wasteful use or not) which he permits to the others. The basis of the Indiana Statute itself condemns Dr. Irion's order. How can that order be reconciled with the proposition that

> "The surface proprietors within the gas field *all* have the right to reduce to possession the gas and oil beneath. ***They could not be absolutely deprived of this right, which belongs to them, without a taking of private property.***"

The basis of this court's decision in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S., 61, is the same as that of the *Ohio Oil Co.* case. The subject matter there was carbonic acid mineral waters, and the statute prohibited pumping under conditions deemed wasteful. The statute was held to be constitutional.

> "It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, *consistently with the continued existence of that right*, so regulates its exercise as reasonably to conserve the interests *of all who possess it*" (p. 77).

The italics, which are ours, sufficiently differentiate the New York Statute from Dr. Irion's order.

The basis of these two decisions, then, is that the Statutes are reasonable embodiments of the principle, "*sic utere tuo ut alienum non laedas.*" That such was the *ratio decidendi* was reiterated in *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229. Discussing the Ohio Oil Co. case, Mr. Justice McKenna said (p. 254):

> "The statute of Indiana was directed against waste of the gas, and was sustained because it protected the

use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose was to secure to the common owners of the gas a proportionate acquisition of it, a reduction to possession and property, not to take away any right of use or disposition after it had thus become property. It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession they could not be deprived of any right which attached to it when in possession."

The same view was adopted in *Walls* v. *Midland Carbon Co.*, 254 U. S. 300. That case sustained the validity of the Wyoming Statute which provided that natural gas, occurring within ten miles of an incorporated town or industrial plant, should not be consumed in a process which did not utilize the heat. Mr. Justice McKenna, in announcing the court's decision, said (p. 319)

> "The determining consideration is the power of the State over, and its regulation of *a property in which others besides the companies may have rights* and in which the State has an interest to adjust and preserve, natural gas being one of the resources of the State. And in this consideration it is more important to consider not for what a particular owner uses the gas, but the prevention of his use to that of others, or it may be the prevention of use by others; * * * *Walls* v. *Midland Carbon Co.*, *supra*, page 319, (italics ours).

The theory of all the cases, then, is: Gas rights are property in a peculiar kind of mineral. The physical character of the mineral is such that waste by one property owner injures the others. The state may properly protect the property of all against waste by a few. The question here is whether the Commissioner's order is reasonably calculated to

accomplish this end. We proceed, therefore, to a consideration of that issue.

Unfortunately, we are in the dark as to the reasoning of the court below on this point; it merely posed the question without discussing it. It concludes its opinion as follows (R., 37):

> "A statute or ordinance depriving one of his liberty or property, is not in violation of the 14th Amendment merely because of such deprivation; nor is every classification made under the police power of a state voidable therefor; the test is that to be valid they rest upon some reasonable public policy and some real and substantial relation to the object sought to be accomplished; and every presumption is in favor of the rightful exercise of its power by the legislature or officer acting under its authority.
>
> "From these considerations it follows that the complainant's bill must be dismissed."

Let us apply the court's test of validity to Dr. Irion's order. Does his classification into old and new manufacturers of carbon black "rest upon some reasonable public policy"? Has the prohibition of all new carbon plants, without the suppression of the old ones, "some real and substantial relation to the object sought to be accomplished"?

In the Indiana case the practice aimed at was that of throwing the gas away in order to get the oil more cheaply. It is clear that the prohibition of this practice conserved the gas for the benefit of all the owners. The New York case is, in a way, the converse of the Indiana case; as the Indiana oil operators were tempted to waste the gas in order to get the liquid more cheaply, so the owners of the surface of Saratoga Springs were wasting the liquid mineral water in order to get the carbonic gas more cheaply. It is clear that the suppression of that waste, as well as the prohibition of deep well pumps, served to conserve the common supply of all the owners.

The Midland Carbon Company case appears to us less clear. It is to be noted, in this connection, that three justices dissented from that decision (among them the authors of the opinions regarding the Indiana and New York statutes), and that it was not followed by the Montana Supreme Court in passing on an almost identical statute. *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294. We take it that the case marks the frontier in this domain of the law. The case holds that the state may prohibit the consumption of natural gas for purposes which do not utilize its heating qualities in a neighborhood where its use as fuel is reasonably economical. The decision rests on the proposition that the prohibition of the more wasteful use (making carbon black) conserves the gas in the ground so that it may later be used less wastefully as fuel.

Such conservation is accomplished by a suppression of the wasteful use either in whole or in part. If the suppression is incomplete, it may be confined to certain areas, as in Wyoming, or the consumption of all wells may be limited to a given percentage of their capacity, as is done in Louisiana. But conservation is not achieved by the suppression of the wasteful use at one well, while the neighboring well continues the wasteful use. One well consuming two million cubic feet of gas wastes as much gas as two wells each consuming one million cubic feet. Conservation is by limitation of total output, not by limitation of the number of wells.

That this is not mere theory is attested by the statistics of the Bureau of Mines. It is not merely possible for fewer wells to burn more gas; such has been the fact. In 1926 there were ten per cent. fewer carbon black plants than in 1923, but they burned ten per cent. more gas.*

The last two years have seen a diminution in the quantity of gas made into carbon black, but this is the result more of reduced consumption per plant than of a reduction in the number of plants. Louisiana burned ten billion cubic feet

(*) Mineral Resources of the United States, 1926—Part II, page 15.

less gas in 1926 than in 1925, with the same number of plants, and they produced *more* carbon black.*

The order directed against this plaintiff specifically will not in any event conserve gas. The plaintiff wants to make carbon black for the Johnson Company, a manufacturer of printer's ink, in which he is interested. Carbon black is an essential ingredient of printer's ink. If the Johnson Company does not buy carbon black from the plaintiff it will buy it from one of the plaintiff's neighbors in the Monroe gas field. Louisiana gas, possibly gas drawn from beneath plaintiff's land, will be burned to produce it; the only difference is that the Johnson Company may have to pay monopolistic prices to the combination of manufacturers who are now in the field.

It is submitted, then, that the ban on new carbon black plants has no "real and substantial relation to the object sought to be accomplished," because (1) it does not conserve gas, and (2) it does not conserve, but on the contrary destroys the coequal interest of all the owners of gas rights. Instead of commanding that no owner shall use an undue proportion of the gas in the common reservoir, it postulates that some, the newcomers, may not use even a due proportion. That it is not intended by the defendants to protect the property of all the owners of gas rights, is attested by the argument advanced by them, that plaintiff has no property to protect. That the order complained of offends against the rule of the *Ohio Gas Co. case*, is sufficiently conceded by defendants' effort to distinguish the cases on the ground that the law of Indiana differs from that of Louisiana.

The court below pointed out that the complainant's bill "does not sufficiently show that the refusal of a permit made any distinction between himself and any other persons who have been so denied *since the adoption of the Commissioner's policy or rule*" (R., 37). It is not contended that such a distinction has been made; i. e., that after adopting the rule the Commissioner gave a permit for some new plants but denied

a permit to complainant. Presumably he has adhered to his rule, which is to prohibit ALL new plants. His discrimination is between plants in operation at the time of the announcement of the rule, and those not yet in operation. Does such a classification "rest upon some reasonable public policy"?

We submit that a lawful classification under a conservation measure must bear a reasonable relation to the geologic and economic facts. Such is certainly true of the Conservation Statutes we have been considering. The Indiana Statute prohibiting the escape of gas applied to all. The New York Statute distinguished between surface wells and wells drilled into the rock which tapped a deeper source. In the Wyoming Statute the distinction was between urban and industrial sections (defined as wells within ten miles of an incorporated town or industrial plant), where the use of gas as a fuel was economically practical, and rural sections, where there was no demand for fuel.

But a distinction between an owner of a well who has already built a carbon plant, and an owner who has not yet set up his equipment has no conceivable geological significance. Its only economic effect would be to prevent the erection of two plants to burn the gas which one plant had burned before, or, in other words, to prevent complainant from investing his money in the buildings and equipment which he considered it to his advantage to erect.

The order complained of is to be distinguished from classifications having a superficial resemblance. To require of persons entering a profession a demonstration of their fitness which is not required of persons already established is reasonable "upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest." *Watson* v. *Maryland*, 218 U. S. 173, 177. *Per contra*, an old carbon black plant consumes gas as wastefully as a new one, and perhaps more so.

If there is not room for two so that either the established business must go or the newcomer must be kept out, it is rea-

sonable to prefer the established concern. Thus, in the days of liquor licenses, it might be reasonable to refuse a license for a new saloon on the northeast corner while permitting the old saloon on the northwest corner to continue, although even that discrimination was forbidden in Louisiana. *Town of Mandeville* vs. *Band, supra; State ex rel. Galle* v. *New Orleans, supra.* But there is no such crowding in the case of the carbon black manufacturers. Dr. Irion's order is more comparable to the prohibition of a new *brewery* while the old brewer continues to make beer and sell it to the same saloon the newcomer desires to sell to.

Geologically and economically, complainant and his neighbors are in the same class. Discrimination between them is unreasonable classification and would be unconstitutional even if the Statute itself made the distinction.

But in point of fact, the legislature has made no such classification. On the contrary, its language shows a clear intention that all owners of gas rights should be treated equally. Section 2 of Act 91 of 1922, which authorizes the Commissioner of Conservation to fix "what percentage of consumption of natural gas produced by *each* gas well may be used in the manufacture of carbon black," provides that "in fixing such basis of consumption *the same rule as far as possible shall be applied to all gas wells in any producing gas area.*"

The Act of 1924 classifies the wells according to the acreage of the tract, with a minimum of one million cubic feet. It makes this distinction between new wells and old; that if for a given well, drilled before June 24, 1924, the new classification reduced the permissible consumption below the 1922 quota, that well could use the 1922 quota. The constitutionality of this distinction between new and old wells there is no occasion to discuss, for the reason that the Commissioner of Conservation declines to put it into effect. A few months after the passage of this act, he announced in substance that new wells would be allowed a quota of zero per cent. instead of that named in the statute.

The classification of the Commissioner which runs thus counter to the classification contained in the statute must necessarily be more obnoxious to the constitution than if the statute contained no classification at all. The Commissoner is trying to enforce Section 4 of the Act of 1924, which reads "the Commissioner of Conservation shall determine [in accordance with the above rules] the allowable percentage that each gas well may produce," as if the words in brackets were omitted. Similarly, he considers it his duty under Section 6 "to make and enforce rules and regulations for the conservation of the gas of the State [not in conflict herewith]." It is under this construction of the Statute that its constitutionality must be examined. *Toucey* v. *Eisner*, 245 U. S. 418, 421.

The court below felt that "the constitutionality of a statute must be determined by its provisions and not by the manner in which it is in fact administered" (R., 37). We had supposed that the contrary was well established.

> "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373.

See *Gorieb* v. *Fox*, 47 Sup. Ct. 675, 676.

If, then, the Statute gives the Commissioner of Conservation power to permit one man to manufacture his gas into carbon black and to refuse that permission to another, without prescribing any rule to guide that administrative officer in the exercise of his power, the Statute clearly offends against the Fourteenth Amendment.

> "When we consider the nature and the theory of our institutions of government, the principles on which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo* v. *Hopkins*, *supra*, pp. 369-370.

The power exercised by the Board of Commissioners of San Francisco in withholding their consent for the establishment of laundries to Chinese, while granting it to Caucasians is hardly more "purely personal and arbitrary" than that of the Commissioner of Conservation, who has agreed with the established manufacturers to let them control the total output of carbon black, while withholding permits from all newcomers (R. 10).

State v. *Carter*, 159 La. 121, 105 So. 247, is a recent Louisiana case which declares unconstitutional a provision of the automobile law similar to the Conservation Statute, as interpreted by the Commission. The statute provided that

> "Except by special permit from the commission (meaning the Louisiana highway commission), no passenger motor transfer of more than seven passengers carrying capacity shall exceed a speed limit of twenty-five miles per hour."

The court held

> "A statute or an ordinance which, instead of prescribing a uniform rule of action, undertakes to vest in a public officer or commission the authority to discriminate in favor of or against persons engaged in a legitimate business or occupation or enjoying a common right by granting or withholding a license or permit or approval, arbitrarily or according to the officer's or commission's favoritism or whim, is violative of the equal protection clause of the Fourteenth Amendment" (p. 247).

V.

An injunction to restrain the Conservation Commissioner and Attorney General of Louisiana from interfering with the use of complainant's property in the manufacture of natural gas into carbon black is the proper remedy to be pursued.

Assuming that the Commission's order infringes complainant's rights, what procedure is appropriate to protect him? He has filed a bill in equity to restrain the defendants, the Commissioner of Conservation and the Attorney General (1) from interfering with the erection of a factory by complainant, and with the subsequent manufacture of carbon black therein, (2) from instituting any suit, civil or criminal, against complainant, by which to penalize him or interfere with such erection of a plant or manufacture therein.

The lower court held that the first prayer was tantamount to a prayer for the issuance of a writ of mandamus, which is beyond the jurisdiction of the federal court, and that the second prayer came within the ban of Section 265 of the Judicial Code (R.,34-36). The court also suggests that the proceedings are directed against the State of Louisiana and therefore contravene the Eleventh Amendment, but it is not clear whether or not the court rests its dismissal of the bill on that ground (R., 36).

It is believed that the court's suggestion that the proceeding is in effect an attempt to accomplish the same end sought by mandamus presents no real obstacle. Mandatory injunctions, of the kind here sought, are a recognized form of equitable remedy. In *Mutual Life Ins. Co.* v. *Boyle*, 82 Fed. 705, such an order was entered in a case strikingly like the present.

The court below recognized that Section 265 of the Judicial Code does not prevent a court of equity from restraining

criminal proceedings under a void statute or ordinance where property rights are threatened. But it held that property rights would not be destroyed by the proceedings threatened by defendants (R., 30). Notwithstanding this last finding, it is submitted that the defendants' threat to "use all legal means at their command to prevent the manufacture of carbon black without a permit" (R., 18) does threaten complainant's property.

In the first place, it destroys the only practicable use of the gas which complainant has actually reduced to possession. The destruction of the use is in effect the destruction of the property. Next, it impairs the value of complainant's gas rights; for the daily drafts made by complainant's neighbors on the common fund of gas are gradually eating away complainant's principal. Finally, it denies complainant practically all income from his land; for the land which cost complainant a large price has no substantial value except for the use which defendants are trying to prevent.

Under such circumstances it seems clear that the criminal and civil proceedings which are prayed to be enjoined *would* destroy property. Moreover the penalties which the defendants assert the right to enforce against the plaintiff accrue at a maximum rate of ten thousand dollars a day and may be followed by the forfeiture of all right to do business within the state. It would be hard to write confiscation in plainer terms. *Dobbins* vs. *Los Angeles*, 195 U. S. 223; *Ex Parte Young*, 209 U. S. 123, 155; *Truax* v. *Raich*, 239 U. S. 33, 37; *Terrace* v. *Thompson*, 263 U. S. 167, 214.

The situation here presents the same possibilities of harassment by means of arresting employees for violation of the orders of the Conservation Commissioner as was made the basis of equitable relief in *Dobbins* v. *Los Angeles*, *supra*, page 241. And the injury to complainant's property is clearly more direct and immediate than that which moved the court to issue its injunction in *Truax* v. *Raich*, *supra*. In that case an alien employee sought to have the Arizona officers

enjoined from enforcing a statute which penalized employers of aliens under certain circumstances. It is submitted that the following language from *Ex Parte Young*, 209 U. S. 123, 155, exactly fits this case.

> "Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

VI.

The right to proceed by mandamus in the State Court, if it exists, is not such an adequate remedy at law as to deprive complainant of his right to equitable relief in the Federal Court.

Defendants urged on brief below that complainant's proper relief was to apply for a mandamus compelling the Commissioner to issue a permit. Whether or not such a writ would lie in the state court, it certainly does not lie in the federal court. *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109. And it is well settled that the remedy at law which will defeat federal equity jurisdiction must be one which can be afforded in the federal courts. *Miss. Mills* vs. *Cohen*, 150 U. S. 202; *Smyth* v. *Ames*, 169 U. S. 466.

VII.

This is not a suit against the State of Louisiana within the meaning and intendment of the Eleventh Amendment to the Constitution of the United States.

Finally we meet the contention that this bill is in reality a suit against the State of Louisiana and therefore contravenes the Eleventh Amendment. As we have said, we are not clear whether the lower court did or did not consider this action a suit against the state. It says that "if the proceedings are to enforce an unconstitutional statute or ordinance, the persons seeking to enforce it on behalf of the State are not considered as representing the State, but act as individual wrongdoers, and a suit to enjoin them is therefore held not to be a suit against the state" (R., 36).

This description fits the case at bar. The citation of authorities is hardly needed for the proposition that "a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconsitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment."

Smyth v. *Ames*, 169 U. S. 466, 518;
Truax v. *Raich*, *supra*;
Pierce v. *Society of Sisters*, 268 U. S. 510.

The court below, in accordance with the contentions of the defendant, attempted to distinguish the instant case from this long line of decisions by this Court on the ground that in the instant case the complainant anticipates merely a wrongful construction of the Statute and does not plead the unconstitutionality of the Statute. But the bill does plead in the most express terms (Paragraph XVIII, R., 8) that the statute, as it has been construed by defendants, is unconstitutional both under the constitution of the State of Louisiana and under the 14th Amendment to the Constitution of the United States. The situation exactly fits the reasoning of Mr. Justice Holmes in *Tourne* v. *Eisner*, 245 U. S. 418, 425.

"The plaintiff says that the statute as it is construed and administered is unconstitutional. He is not to be defeated by the reply that the Government does not adhere to the construction by virtue of which alone it has taken and keeps the plaintiff's money, if this court should think that the construction would make the act unconstitutional. While it keeps the money it opens the question whether the act construed as it has construed it can be maintained."

CONCLUSION.

The decree of the District Court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

John W. Davis

.....

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APPENDIX.

Statutes and Portions of Statutes of the State of Louisiana Relevant to this Case.

Act 250 of 1920.

An Act granting to the Department of Conservation, created by laws of Louisiana, greater power and authority in the work of conserving the crude petroleum, natural gas and mineral substances mined or produced in the State of Louisiana, giving to the Department of Conservation power and authority to adopt and promulgate, amend and re-adopt, rules and regulations for the drilling, development, sinking, deepening and abandonment of natural gas and oil wells, and to promulgate rules and regulations for the opening and operation of all mines in the State of Louisiana; and to prescribe rules and regulations regulating the production and use of natural gas, and requiring that the gasoline contained in the natural gas used by carbon plants be extracted and saved before such gas be utilized for the making of carbon; empowering and authorizing the Department of Conservation to take charge of, control, or securely cap or plug any natural gas well or oil well wasting oil or gas and not in control; providing for proceedings in the exercise of this authority; and giving a lien and privilege in favor of the Department of Conservation for all reasonable expenses and costs incurred by it, or under its authority, in the closing, capping or plugging of any such uncontrolled or wild well, and extending this lien and privilege to all leases, property and equipment owned by the company, firm or individual owning such wild well, and defining the word "waste" as used in this act; and requiring persons, associations and corporations mining, drilling or operating oil or gas wells or mines to report to the Department of Conservation from time to time on the

output of such well or mines; prescribing penalties for the violation of this Act and the rules and regulations of the Department of Conservation adopted pursuant hereto; and limiting the amount of fine or term of imprisonment that may be imposed; authorizing and empowering the Department of Conservation to resort to courts for legal, equitable or criminal process to compel obedience and compliance with its rules and regulations; and to enforce any of the provisions of this Act; authorizing the Department of Conservation to appeal from any judgment or decree against it, or any order restraining the Department in the exercise of its authority; granting the right to appeal to any person, association or corporation from any judgment, order or mandate of the Department of Conservation directed against it; and authorizing the determination of the reasonableness of the orders, rules and regulations of the Department of Conservation in any court of competent jurisdiction at the timely instance of any party affected thereby and conferring jurisdiction therefor; making it the duty of the Attorney General, on request, to represent the Department of Conservation, and authorizing the appointment of a District Attorney to appear instead of the Attorney General, under certain conditions; declaring all legal proceedings hereunder to be preference matters entitled to summary trial and disposition in courts of competent jurisdiction; providing for appropriations of funds necessary for the enforcement of this Act, and regulating the issuance of injunctions restraining the Department of Conservation in its control of wild gas wells and providing for injunction bonds therewith.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the Department of Conservation, created by the laws of the State of Louisiana, acting through the Commissioner of Conservation, is hereby empowered and directed to adopt and promulgate, pursuant to the provisions of the Constitution and laws of the State of Louisiana and

of this Act, such rules and regulations as said Department may deem necessary for the conservation of the crude petroleum, natural gas and mineral substances produced in the State of Louisiana, and to provide rules and regulations for the drilling, development, sinking, deepening, abandonment and operation of oil wells, gas wells and mines for the purpose of conserving the products produced therefrom, and to prevent the waste of such products, and to require persons, associations and corporations mining, drilling or operating such well or mines to report to it from time to time on the output of the wells or mines being operated by them.

Section 2. Be it further enacted, etc., That the Department of Conservation is authorized by the grant of power in this act to prescribe rules and regulations requiring that the gasoline contained in natural gas used by carbon plants be extracted and saved before such gas be utilized for the making of carbon, where such gas contains sufficient gasoline to make the extraction thereof beneficial or profitable.

Section 3. Be it further enacted, etc., That the Department of Conservation be and it is hereby given supervision over the production and use of natural gas in connection with the manufacture of carbon black, in other manufacturing enterprises and for domestic consumption; and that power and authority is hereby granted to the Department of Conservation to prepare and promulgate all necessary and reasonable rules and regulations providing for the conservation of natural gas produced for and used in plants manufacturing carbon black, in other manufacturing enterprises and for domestic consumption; hereby especially granting to the Department of Conservation the power to limit the amount of gas which may be withdrawn from all the gas wells in any particular gas field or area to a percentage of the potential capacity of such gas wells as may be reasonably necessary to conserve and safeguard an adequate supply of natural gas.

* * * * * * * *

Section 11. Be it further enacted, etc., That the Department of Conservation acting through the Commissioner of Conservation, shall have power to amend, re-adopt, and prescribe new rules and regulations, from time to time, whenever in the judgment of the said Department the same are necessary.

* * * * * * * *

ACT 91 OF 1922.

An Act to regulate and control the use of natural gas in the manufacture of carbon black, and to prescribe penalties for the violation of this act.

Section 1. Be it enacted by the Legislature of Louisiana that natural gas may be used in the manufacture of carbon black under the conditions as fixed and imposed by the provisions of this act.

Section 2. That the Commissioner of Conservation is authorized, directed, and empowered to fix and determine on the 1st day of October, 1922, and semi-annually thereafter, what percentage of consumption of natural gas produced by each gas well may be used in the manufacture of carbon black, said percentage of consumption to be based upon the potential capacity of such gas well, and which percentage shall not be less than fifteen per cent. and not more than twenty per cent. of the potential capacity of such well, provided that in fixing such basis of consumption the same rule, as far as possible, shall be applied to all gas wells in any producing gas area, and provided further, that the percentage of consumption may be increased in any particular well when the safety of such well may demand such increase.

Section 3. That the Commissioner of Conservation is authorized, empowered, directed, and required to reduce the consumption of natural gas used in the manufacture of carbon

black below the minimum fixed in Section 2 of this Act, after promulgation for sixty days of an order to that effect, whenever it is actually necessary to do so in obtaining an adequate supply of natural gas for domestic heating and lighting purposes in the State of Louisiana, and for manufacturing plants, industries and enterprises located and operated within the State of Louisiana, other than those engaged in the manufacture of carbon black; provided that the conditions set out in this Section shall not become effective until such time as the establishment of factories, industrial plants, and enterprises, the construction of pipe lines in the State of Louisiana, and domestic consumers in Louisiana, or any one of such shall provide a demand which necessitates the enforcement of the same.

Section 4. That no person, partnership, firm, corporation, or association of persons shall be permitted to use natural gas in the manufacture of carbon black without extracting and saving therefrom the gasoline contained therein, provided the amount of gasoline therein contained shall not be less than one hundred and fifty gallons to the million cubic feet of gas, such content to be based on the amount of gasoline actually recoverable by modern extraction plants as generally operated; and provided further that the Commissioner of Conservation may suspend the operation of this Section in case of emergency.

Section 5. That the Commissioner of Conservation is authorized, empowered, and directed to make, adopt and promulgate orders, rules and regulations, which in his judgment may be necessary for the proper carrying out of the provisions of this act.

Section 6. That it shall be the duty of the Commissioner of Conservation to enforce the provisions of this Act and the orders, rules and regulations made, adopted and promulgated by him.

Section 7. It shall be the duty of the Department of Justice to represent said Commissioner in the enforcement of the provisions of this Act, and of the orders, rules and regulations made, adopted and promulgated by said Commissioner of Conservation.

Section 8. That any person, partnership, firm, corporation, or association of persons violating any of the provisions of this Act, or any rule, regulation or order of the Commissioner of Conservation prescribed by authority of this Act, shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, in the discretion of the Court, and each and every day in which any person, partnership, firm, corporation, or association of persons shall violate any of the provisions of this Act, or any such rule, regulation or order of the Commissioner of Conservation, shall constitute a separate offense hereunder and subject the offender to the penalty herein provided; and three convictions for violating any of the provisions of this Act, or any such rule, regulation, or order of the Commissioner of Conservation, shall subject the offender to the forfeiture of the right to manufacture natural gas into carbon black, at the suit of the Commissioner of Conservation before a Court having jurisdiction at the place where such offenses are committed, and the Court may, in its discretion, decree such a forfeiture.

ACT 134 OF 1924.

An Act prescribing the authority and power of the Commissioner of Conservation in the direction, control, and preservation of the mineral resources of the State.

Section 1. Be it enacted by the Legislature of Louisiana, That wherever in the laws prescribed for the severing and conservation of the mineral resources of the State a certain discretion is vested in the Commissioner of Conservation in the matter of issuing permits and making contracts and

agreements for severing, the same shall not be exercised except on the approval of the Attorney General and the Governor.

ACT 252 OF 1924.

An Act to conserve the natural gas resources of the State of Louisiana; to define the conditions under which natural gas can be burned into carbon black; to establish rules and regulations for the drilling for and the production of gas; to provide for the spacing of gas wells and to limit the percentage of the open flow capacity of gas wells that may be taken from such wells and to fix the maximum percentage that may be taken from them; to give the Commissioner of Conservation of this State authority to make rules and regulations for the conservation of the natural gas resources of the State; to make it a misdemeanor to violate any of the provisions of this Act, and to provide penalties therefor; and to provide for bringing corporations into court in criminal prosecution under this Act.

SECTION 1. Be it enacted by the Legislature of Louisiana, That natural gas shall not be produced in the State of Louisiana in such manner, and under such conditions as to constitute waste. The term "waste," as herein used, in addition to its ordinary meaning shall include: (1) escape of gas in commercial quantities into the open air from a stratum recognized as a gas stratum, but it is not intended to have application to gas pockets in high points in a stratum recognized as an oil stratum; (2) drowning with water of a gas stratum capable of producing gas in commercial quantities; (3) underground waste; (4) wasteful burning of any gas well; (5) wasteful utilization of gas; (6) and allowing gas wells or pipe lines to leak or blow off.

Section 2. The following rules and regulations shall be observed in drilling for, producing, taking, transporting, piping, and using gas in this State:

1. No gas well shall be drilled in this State without a written permit therefor from the Commissioner of Conservation designating the location of the proposed well.

2. Whenever natural gas in commercial quantities, or a gas-bearing stratum known to contain natural gas in such quantities is encountered in any well drilled for oil or gas in this State, such gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste, and all such strata shall be adequately protected from infiltrating waters.

All operators, contractors, drillers, pipe line companies, gas distributing companies or individuals, drilling for or producing gas, or piping gas for any purpose, shall use every reasonable precaution in accordance with the most approved methods to stop and prevent waste of gas in drilling and producing operations, or distributing the same, and shall not wastefully utilize gas, or allow it to leak or escape from natural reservoirs, wells, pipe lines, or other containers.

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Section 4. The Commissioner of Conservation shall determine in accordance with the above rules the allowable percentage that each gas well may produce, and such determination shall protect the gas producer from any of the penalties by this Act provided; and the failure of the Commissioner of Conservation to determine in advance the allowable quantity that each well may produce shall authorize the gas producer to determine such percentage without incurring the penalties provided by this Act, and where a well is drilled on land not sectionized by governmental survey, or where under any other conditions no rule is laid down for determining the open flow capacity that any well or wells may be allowed to produce, such wells shall be allowed to produce approximately the same percentage that they would if the land had been regularly sectionized, and the Commissioner of Conservation shall fix the allowable percentage that such wells may be allowed to produce in conformity to this rule.

It shall be unlawful for any person, firm, corporation, or association of persons to take more gas from any well for a period of seven consecutive days than the maximum production allowed to be taken from such well would amount to for the same period, or to take more gas from any well in any one day than one and one-half times the allowable production of such well, or to take any gas whatever from any gas well when the working pressure of such well is less than one-half the closed pressure of such well, and provided that the working pressure of any well can not be reduced below 200 pounds regardless of what the closed pressure is, and provided further than in all fields where the rock pressure is less than 200 pounds and the gas is being produced, sold and transported for domestic and industrial fuel purposes exclusively the back pressure herein provided for shall not apply where artificial means are employed to produce and market the gas from such fields and when the rock pressure of such fields is less than 150 pounds the withdrawal percentages provided for herein shall not apply.

When in his judgment he thinks it necessary to conserve the gas in any well or in any area, or to protect any person from financial loss, the Commissioner of Conservation may increase or decrease the percentage of the open flow capacity that may be taken from any gas well or wells, as he may increase or decrease the working pressure required to be maintained in such gas wells.

Section 5. The Commissioner of Conservation may grant permits for the building of plants to burn natural gas into carbon black under the conditions and provisions of Act 91 of 1922, except that the percentage of the open flow capacity of gas wells that may be utilized in burning carbon black shall be controlled by this Act when the production of such wells is controlled by this Act and by Act 91 of 1922 when the percentages that such wells may produce is controlled by said Act 91 of 1922. Such permits shall only be granted to bona fide applicants and which permits shall automatically expire one year after date of issue.

Where gas is burned into carbon black in this State it must be burned economically and efficiently.

No gas whatever shall be piped out of the State and burned into carbon black in another State.

1. Each and every carbon black manufacturer and gas producer shall make a report in duplicate to the Commissioner of Conservation on or before the twentieth day of each month showing the total amount of gas sold or consumed, the amount of gas burned into carbon black, and the amount and kind of carbon black produced during the preceding month.

2. The Agents of the Department of Conservation shall, at all times, have access to any carbon black plant for the purpose of obtaining any and all information necessary to the carrying out of the provisions of this Act, and it shall be the duty of those in charge of such carbon black plants to furnish such Conservation Agents with such information.

3. No permit shall be granted, and the Commissioner of Conservation is without authority to grant a permit for the construction of a new carbon black plant except upon written application on forms prepared by the Department of Conservation, in which application the applicant shall state that he, they or it, willfully and completely abide by and comply with all of the provisions of this Act, and with all the rules and regulations of the Commissioner of Conservation established under the provisions of this Act.

4. A monthly report, not later than the 20th of each month, shall be furnished the Department of Conservation showing the total amount of gasoline extracted from gas during the preceding month. This report shall be made by each operator extracting gasoline from gas.

5. The Commissioner of Conservation shall compile monthly reports from the reports furnished by the producers showing the total amount of gas produced, carbon made, and gasoline extracted, which totals shall be open to the public but the individual reports shall not be open to public inspection. All gas meter reports shall be public records.

Section 6. It shall be the duty of the Commissioner of Conservation to make and enforce rules and regulations for the conservation of gas of this State not in conflict herewith. He shall have authority to prevent the waste of gas in drilling and producing operation and in the piping and distribution thereof, and to make rules and regulations for that purpose. It shall be his duty to require dry or abandoned wells to be plugged in such a way as to confine oil, gas or water to the stratum in which they are found, and to prevent them from escaping into other strata, and to establish rules and regulations for that purpose. He is empowered to establish rules and regulations for the location and spacing of wells, and the amount of gas that may be drawn from any well or wells, not in conflict with this Act, or any other law of this State.

It shall be his duty to establish rules and regulations for the drilling of wells and keeping records thereof, and to require such wells to be drilled in such manner as to prevent injury to the adjoining property, and to prevent gas and water from escaping from the stratum in which they are found into other strata, to establish rules and regulations for shooting wells, and for keeping the gas separate from any water or oil bearing stratum. He shall have authority to require records to be kept, and reports made by gas well drillers, operators, pipe line companies, carbon companies, or any other users of gas, and to establish such rules and regulations as may be necessary to carry into effect the provisions of this Act, and as may be necessary to conserve the gas resources of this State, whether herein specifically granted or not, the only limitation being that such rules and regulations shall not be in conflict with the provisions of this Act.

He shall enforce the provisions of this Act, and of Act 270 of 1918, and of Act No. 91 of 1922.

* * * * * * * *

Section 8. That any person, partnership, firm, corporation or association of persons wilfully violating any of the provisions of this Act, or any rule, regulation or order of the Commissioner of Conservation prescribed and promulgated by

authority of this Act, which rules, regulations and orders are hereby declared to have the force and effect of statutory law, shall be guilty of a misdemeanor, and on conviction thereof shall be punished for the first offense by a fine of not less than One Hundred ($100.00) Dollars, and not more than One Thousand ($1000.00) Dollars and for the second offense not less than One Hundred ($100.00) Dollars, nor more than Five Thousand ($5000.00) Dollars, and for the third offense not less than One Hundred ($100.00) Dollars, nor more than Ten Thousand ($10,000.00) Dollars, in the discretion of the Court, and each and every day on which any person, partnership, or association of persons shall violate any of the provisions of this Act, or any such rule, regulation or order of the Commissioner of Conservation, except as provided in Section No. 4 hereof, shall constitute a separate offense hereunder and subject the offender to the penalty herein provided; and three convictions within a period of two years for violating any of the provisions of this Act, or any such rule, regulation or order of the Commissioner of Conservation, where the violations are willful and where the second violation succeeds a prior conviction, and the third violation succeeds the second conviction, shall subject the offender in the discretion of the court to the forfeiture of the right to do the business in the State that such offender is engaged in or carrying on, and wherein such convictions were had, at the suit of the Commissioner of Conservation before a Court having jurisdiction at the place where such offenses were committed.

Section 9. It shall be the duty of the Attorney General, or the District Attorney of any Judicial District where the businesses described herein are being conducted, to represent the Commissioner of Conservation in the enforcement of all the provisions of this Act, and of the orders, rules, and regulations made, adopted and promulgated by said Commissioner of Conservation by authority of this Act. All criminal prosecutions under this Act shall be by the District Attorney of the Judicial District having jurisdiction of such offenses the same as any other criminal prosecution.

• • • • • • • •

Section 11. The authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other Act of this State, but shall be cumulative and in aid thereof.

* * * * * * * *

RULES AND REGULATIONS OF THE DEPARTMENT OF CONSERVATION.

Rules, Regulations and Requirements Governing the Conservation of Natural Gas and Crude Oil or Petroleum.

* * * * * * * *

RULE 2.—*Waste Defined—Protection.* The term "waste" as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste and waste incident to the production of crude oil or petroleum in excess of transportation, storage, or marketing facilities.

* * * * * * * *

RULE 29 (Revision).—*Permits for Carbon Black Plants.* It shall hereafter be unlawful for any person, firm, corporation, or association to commence the erection in the State of Louisiana of any carbon plant or plants for the manufacture of carbon black from natural gas or to make any extensions or enlargements of such carbon plant or plants hereafter begun, or enlargements of existing plants wherein the erection of such enlargements have not been commenced prior to the promulgation hereof, without having first obtained from the Department of Conservation of the State of Louisiana a special permit, officially signed.

All permit applications as referred to here must be accompanied by a complete and accurate copy of the plants and specifications of the proposed work, stating the amount of gas desired to be used and giving the size of plants, number of houses to each unit of each plant, etc., together with the plant location, name and postoffice address of the company or owner of such plant or plants.

* * * * * * * *

RULE 43.—*Gas Quota and Gasoline Test on Gas in Monroe Field.* In accordance with the provisions of Act 91 of the Acts of the Legislature of 1922, and under the authority of Section 2 of the said Act, which empowers the Commissioner of Conservation to fix and determine on the 1st day of October, 1922, and semi-annually thereafter, what percentage of consumption of natural gas produced by each gas well may be used in the manufacture of carbon black, the following rule is hereby promulgated:

All persons, operators, companies, partnerships, associations, or corporations, whether owners or lessees of a well or wells in the Monroe gas field, and who may be producing therefrom natural gas in connection with the manufacture of carbon black, are hereby prohibited from taking more than twenty (20) per cent of the daily natural flow of any such well or wells within the limits of said field.

All persons, operators, companies, partnerships, associations, or corporations drilling a well or wells in the Monroe gas field shall make a test under the most approved methods for the gasoline contained in the natural gas of such well or wells and report same to the Department of Conservation within thirty days of the time of finishing such well or wells.

* * * * * * *

RULE 49.—*Transfers of Carbon Black Permits and Changes in Plants.* Persons, firms, or corporations holding permits to build carbon black plants shall notify the Department of Conservation immediately when it is desired to transfer such permits, to change the name of the person, firm or corporation holding same, or to change the location of any plant. Such notification shall be given in writing and include complete information on such changes.

Office Supreme Court
FILED
OCT 8 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 503.

J. SMYLIE HERKNESS,

Appellant,

versus

VALENTINE K. IRION, Commissioner of Conservation of the State of Louisiana, and PERCY SAINT, Attorney General of the State of Louisiana.

BRIEF FOR APPELLEE.

PERCY SAINT,
Attorney General;
W. H. THOMPSON,
Assistant Attorney General.

Of Counsel:
EDWARD RIGHTOR.

MONTGOMERY-ARDREY PRINTING CO., INC., 420-432 CHARTRES, N. O.

SUBJECT INDEX.

	Page
This Court is Without Jurisdiction	1
Statement of the Case	2
Argument	7-35
I. The Court below was without jurisdiction and an appeal was improperly allowed to this Court	7
II. This case does not come under Section 266 of the Judicial Code	11
III. If the letter or declared policy of the Conservation Commissioner could be considered an order of the Administrative Board, it is not contrary to the Statutes and Constitution of Louisiana	14
IV. If the letter or policy of the Conservation Commissioner can be considered an order by the Conservation Commissioner and an order of an administrative board, it is not contrary to the Fourteenth Amendment	22
V. An injunction to restrain the Conservation Commissioner and the Attorney General of Louisiana from preventing the complainant to erect a manufacturing plant for the purpose of manufacturing natural gas into carbon black, without a permit, is not the proper remedy to be pursued	27

Table of Cases—(Continued)

	Page
Virginia v. United States, 272 U. S., 671	14
Walls v. Midland Carbon Co., 254 U. S., 300	23
Watson v. Maryland, 218 U. S., 173	26
Waugh v. University of Mississippi, 237 U. S., 589	25
Williams v. Arkansas, 217 U. S., 79	26
Williams, Ex parte (reported in Advance Opinions of June 15, 1928, No. 16, p. 523)	14
Young, Ex parte, 209 U. S., 123	28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 50

J. SMYLIE HERKNESS,

Appellant,

versus

VALENTINE K. IRION, Commissioner of Conservation of the State of Louisiana, and PERCY SAINT, Attorney General of the State of Louisiana.

BRIEF FOR APPELLEE.

THIS COURT IS WITHOUT JURISDICTION.

The jurisdiction of this Court, according to brief of appellant, is invoked under paragraph 3 of Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat., 936, 938.

It is believed that the jurisdiction of this Court is not sustained by the authorities cited. It is believed that this Court is without jurisdiction and that this want of jurisdiction is sustained by *Moore v. Fidelity & Deposit Co., 272 U. S., 317; Smith v. Wilson, 273 U. S., 388.*

STATEMENT OF THE CASE.

Appellant, Herkness, is the owner of 80 acres of land, and of the gas rights on seven hundred sixty contiguous acres in the Monroe Gas Fields of Louisiana. (Par. 4 of Complaint, R. 2).

Under State permit two producing gas wells were drilled. One of the wells was on the eighty acres owned in fee simple, and the other on the seven hundred sixty acres. (Par. 5 of Complaint, R. 2).

Appellant contends that this land and the gas rights were purchased by him with a view of erecting a plant for the manufacture of carbon black and a plant for the manufacture of ink from the carbon black so produced; that he purchased the property in June, 1925, for a consideration of $212,000.00, and that it is without substantial value except for the purpose of producing natural gas and manufacturing it into carbon black. (Par. 6 of Complaint, R. 3).

He further complains that the Legislature of Louisiana has not prohibited the use of natural gas for the making of carbon black, but that by the provisions of Act 91 of 1922 it has expressly authorized its use in the manufacture of carbon black under the conditions imposed by that act and by Act 252 of 1924. (Par. 7 of Complaint, R. 3). That he applied to the Commissioner of Conservation for a permit to erect a factory for the manufacture of carbon black, and that the application was made on the form pre-

scribed by the Commissioner; that he was ready and willing to comply with all statutory requirements relative to the manufacture of natural gas into carbon black.

The Commissioner of Conservation alleged that the extraction of natural gas from the soil and the making of same into carbon black, which the appellant declared he exclusively intended to do, is a waste of the natural resources of the State; that the natural gas in said field was being extensively used for industrial and domestic purposes; that there was being constructed a pipe line whereby the natural gas of the field would be thus supplied for industrial and domestic purposes at a cheaper price; that in 1924 the Legislature passed Act 252 to conserve the natural gas resources of the State and to define the conditions under which natural gas could be burned into carbon black, and to limit the amount that could be produced. Since April 14, 1924, no permit had been issued by the Conservation Commission to anyone to extract natural gas from the soil for manufacture into carbon black, and all permits applied for had been rejected and refused. In spite of the public declaration of the Commissioner of Conservation that he would grant no more permits for the manufacture into carbon black, appellant, Herkness, in June, 1925, long after said policy had been established, came into this State and purchased the said property; that the Commissioner of Conservation was ordered by the Constitution to protect, preserve and replenish the natural resources of the State, and to further permits by him for the manufacture of carbon black would result in a waste and complete exhaustion; that he is given the authority to issue permits in his official capacity; that he embarked on this

policy of not renewing permit already granted, and has permitted only those who are already engaged in the manufacture of carbon black to continue same to a limited extent, because the shutting down of their plants would result in the destruction of large investments which had been made; that he had been reducing the quantity of natural gas by the owners of wells already operating, with the end in view of ultimately stamping out the industry in this State without too heavy a loss to those already engaged in the industry; that the Commission had gradually been reducing the output of carbon black from high pressure gas in the State; that on March 21, 1925, it curtailed the supply of gas and reduced the carbon black to two hundred ninety-nine million feet per day; on September 1, 1925, to two hundred ninety million feet per day, and on March 1, 1926, to two hundred seventy-five million feet per day; that at one time there was used from said field for carbon black purposes from four hundred fifty to five hundred million feet per day, and that if he were forced to grant a permit to the appellant that he must grant permits to all applicants and the policy of the State in preserving its natural gas for industrial and domestic use would be defeated.

The Commissioner applied to the Attorney General for an opinion as to whether he had the legal authority to refuse to issue the permit. The Attorney General advised him that he had full power to decline any further permits (R. 15) and the permit was therefore declined. The Attorney General and the Commissioner of Conservation informed complainant that they would use all legal means at their command to prevent his manufacture of carbon black without a permit. (R. 18).

Complainant applied to the District Court of the United States for an injunction restraining the defendant from interfering with the erection of a carbon black plant or with the operation thereof, and restraining them from attempting to impose penalties for the erection of the plant. (R. 11).

Appellant complained that the Legislature of the State had not confined, or attempted to confine, the production of natural gas and the manufacture thereof into carbon black, to those persons who were then engaged in such manufacture and production, and that the action of the defendant, Irion, acting in conjunction with the Attorney General, in attempting to prohibit him from manufacturing gas into carbon black is **illegal and without authority, and contrary to the laws of the State.** (Par. 17 of Complaint, R. 8).

He complained that if the laws of the State of Louisiana are to be construed as authorizing the Commissioner to prohibit him or as delegating to the Commissioner the right to prohibit such manufacture, except by persons to whom he may choose to issue such permits, then such laws are in violation of the provisions of Sections 1 and 2 of Article II of the Constitution of Louisiana of 1921, dividing the powers of Government and prohibiting the exercise of legislative power by the Executive Department, and of Section 6 of Article I of the Constitution of Louisiana, prohibiting the deprivation of property, except by due process of law, and of the provisions of Section 1 of the Fourteenth Amendment prohibiting any State from depriving any person of property without due process of law, or denying

to any person the equal protection of the law. And he complained that since the combinations referred to, the price of carbon black had been increased from five to eight cents per pound.

Defendants excepted to the complaint, as follows:

(1) That the Court was without jurisdiction *rationae personae* or *rationae materiae*.

(2) That Article 266 of the Judicial Code does not authorize these proceedings.

(3) That this is a suit against the State, contrary to the 11th Amendment to the Federal Constitution.

(4) That the bill is insufficient to constitute a valid cause of action in equity. (R. 18).

With reservation of these exceptions the defendant answered, admitting the refusal to grant a permit. He claimed that it was discretionary for him to issue permits and that to issue a permit to the appellant would be contrary to the policy publicly announced. On this bill and answer and an affidavit of complainant, given in lieu of testimony (R. 24, 25), the case was heard.

At the time of trial in the Lower Court, complainant requested a stipulation that the hearing be considered a final hearing. It was so stipulated (R. 30). The Lower Court entered a final decree. (R. 37). Appellant appealed from a final decree. (R. 38).

The stipulation of the parties (R. 30) is "that the hearing had in this suit on January 1, 1926, shall be considered and treated as a final hearing."

The Court, consisting of Foster, Circuit Judge, and Grubb and Burns, District Judges, dismissed the bill. (R. 37, 38). Subsequently, an appeal was prosecuted to this Court, and pending the determination of this appeal the defendants were enjoined from interfering with the erection and operation of a carbon black plant.

ARGUMENT.

(I)

The Court Below Was Without Jurisdiction and an Appeal Was Improperly Allowed to This Court.

Under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, no right exists to a direct appeal to this Court on constitutional grounds alone; the right now exists only in cases falling within the provisions enumerated in that section. Among the provisions so enumerated is Section 266 of the Judicial Code. *Moore v. Fidelity & Deposit Co., 272 U. S., p. 317.*

If the Court of three Judges was not vested with jurisdiction, then an appeal would not lie directly to this Court. *Smith v. Wilson, 273 U. S., 388.*

In order for the Court below to have jurisdiction under Article 266 of the Judicial Code, it was necessary for complainants to attack Act 252 of 1924 as being in conflict with the Constitution of the United States, or to attack as unconstitutional an order issued by an administrative board or commission acting under and pursuant to a statute of such State.

The complainant does not attack Act 252 of 1924 as being violative of either the Federal or the State Constitution, neither does he attack an order made by the Conservation Commissioner as unconstitutional. There is no allegation in the complaint that the Conservation Commissioner, acting under and pursuant to the statutes of the State of Louisiana, has issued any order which is violative of either the Federal or the State Constitution. The allegations of the complaint are found in paragraphs 17 and 18, which are as follows:

> "Section 17. Complainant alleges that he has a lawful property right in and to the land owned by him in fee simple, hereinabove described, and in and to the two gas wells hereinabove described, and has also the right of the free use and enjoyment thereof, subject only to such restrictions as might be reasonably and lawfully imposed upon him in common with all other persons, by the Legislature of Louisiana, with regard to the extraction of natural gas and with regard to the use thereof; that the Legislature of the State of Louisiana has not confined, or attempted to confine, the production of natural gas and the manufacture thereof into carbon black, to persons who are now engaged in such production and such manufacture; that the action of the defendant, Valentine K. Irion, acting in conjunction with and under the advice of the defendant, Percy Saint, in attempting to prohibit complainant, and all persons other than those now engaged in the production of natural gas and in the manufacture thereof into carbon black from producing such gas or manufacturing same into carbon black is illegal and without authority, and contrary to the laws of the State of Louisiana.
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> "Section 18. That if the laws of the State of Louisiana are to be construed as authorizing the

defendant, Valentine K. Irion, to prohibit the production of natural gas and its manufacture into carbon black, save in the case of such persons as are now engaged therein, or as delegating to said Irion the right to prohibit such production and manufacture, except by persons to whom he may choose to issue permits, then such laws are in violation of the provisions of Sections 1 and 2 of Article II of the Constitution of Louisiana of 1921, dividing the powers of Government and prohibiting the exercise of legislative power by the Executive Department, and of Section 1 of Article VI of said Constitution providing for the protection by the Legislature of the natural resources of Louisiana, and of the provisions of Section 2 of Article I of said Constitution, prohibiting the deprivation of property, except by due process of law, and of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting any State from depriving any person of property without due process of law, or denying to any person the equal protection of the law."

It will thus be seen that he only attacks the acts of said Irion and Saint as being illegal and without authority, and contrary to the statutes of the State of Louisiana. (Par. 17 of the Complaint, R. 7).

There is no allegation in this paragraph that they, or either of them, acted either under an unconstitutional statute or under an order issued and made pursuant to a statute of the State of Louisiana. The contention is, that they were acting contrary to and beyond any statute. Paragraph 18 clearly shows that he is attacking the construction placed upon Act 252 of 1924 by the authorities of the State of Louisiana.

We believe that counsel concedes that no attack is made upon the constitutionality of Act 252 of 1924, because they contend that the order is unconstitutional and that the order being unconstitutional gives to this Court jurisdiction. Unfortunately for counsel, the complaint does not allege that an unconstitutional order was made and issued by the Conservation Commissioner pursuant to and in accordance with the statutes of the State. In fact, no order has been issued within or without a statute of the State of Louisiana, unless it be said that the letter written to complainant or the declared policy of the Commission could be construed and held to be an order within the meaning of Section 266 of the Judicial Code.

If we are correct in our contention that under paragraph 3 of Section 238, as amended by the act of February 13, 1925, that the Court of three Judges would only have jurisdiction where the unconstitutionality of a statute or an order issued by an administrative board pursuant to a statute was attacked as unconstitutional, then it follows that this special tribunal was without jurisdiction, and it being without jurisdiction no appeal would lie directly to this Court.

In the case of *Okla. Gas Co. v. Russell*, cited by complainant, an order was issued refusing the application for an advance in the gas rates, and, of course, presumably the Commission issued a written order denying the increase; and, in so doing, it was acting under the authority of and pursuant to a statute of the State of Oklahoma.

As stated before, no such allegations are made in the bill filed in this case, and, therefore, this case is not authority for the position taken by the complainant.

(II)

This appeal does not come under Section 266 of the Judicial Code and should be dismissed for lack of jurisdiction.

Complainant contends that he has correctly taken from the decree of the Court of three Judges an appeal direct to this Court. Defendant contends that appeal herein should have been made only to the Court of Appeal. Both of us, however, rely for the correctness of our contention upon the same authorities.

Our understanding is that under *Smith v. Wilson, 273 U. S., 388, 47 S. C., 385,* and *Moore v. Fidelity & Deposit Company, 272 U. S., 317,* there are three conditions that must exist in this case in order that an appeal might be taken direct to this Court:

(1) A proper constitutional question must be at issue.

(2) There must have been an application for a preliminary injunction "made and pressed to a hearing" before three Judges; and,

(3) There must have been a final hearing before three Judges.

In the cases cited above, this Court found that both the purpose of the statute and its amendments was to require three Judges on both hearings and "to relieve this Court by restricting the right to review by it."

As we understand the statute, a hearing is required before three Judges on preliminary hearing and another hearing before three Judges on final hearing in a case adversely decided, before this Court can hear the case on direct appeal from a decree on final hearing. Then, and only then, will this Court consider a final decree adversely to appellant.

Has there been a hearing before two Courts of three Judges herein?

At the time of trial in the Lower Court, complainant requested a stipulation that the hearing be considered a final hearing. It was so stipulated (R. 30). The Lower Court entered a final decree (R. 37). Appellant appealed from a final decree (R. 38). There was, therefore, no hearing before six Judges as the statute requires.

In *Smith v. Wilson*, as here, the preliminary injunction was applied for but not pressed. A final hearing was alone had. The appeal, therefore, should herein be made to the Court of Appeal and this appeal should be dismissed.

It is not contended that were this an appeal from a decree refusing a preliminary injunction that this Court would not have jurisdiction, but it is contended that this is an appeal from a decree refusing a permanent injunction.

The stipulation of the parties (R. 30) is "that the hearing had in this suit on January 21, 1926, shall be considered and treated as a final hearing." The Lower Court entered a final decree. (R. 37).

In appellant's petition for an appeal (R. 38) appellant says: "On March 6, 1926, a final decree was entered and signed."

In appellant's assignment of errors (R. 44), No. 15, he says, "the Court erred in not rendering a final decree in petitioner's favor as prayed and in not issuing a permanent injunction as prayed for by petitioner."

There can be no good reason why an appeal should be allowed to this Court direct on a refusal to grant a temporary injunction and should not be allowed to this Court direct on the refusal to grant a permanent injunction, in the second case only where an application for a preliminary injunction was made and pressed to a hearing, other than this: that the law writer thought that a permanent injunction was a matter of so much more serious moment than a preliminary injunction, that a hearing by six Judges must be had in the case of a permanent injunction whilst only three were required in the case of a preliminary injunction.

Considering the herein appeal as a hearing that resulted in a permanent decree, then the record in this case as far as the instant question is concerned is in exactly the same condition as the record in *Smith v. Wilson*, cited above.

The Court below was clearly correct in holding that it was "concerned only with violations of the Federal Constitution." (R. 34).

It is believed that this contention is supported by *Cook v. Burnquist, et al., 242 Fed., 321;* and *Virginia v. U. S., 272 U. S., 671,* in which this Court said:

> "Section 266 provides for the hearing before three judges of applications for an interlocutory injunction to restrain the execution of a State statute, or of an order of an administrative board of the State pursuant to a State statute, where the statute or order is assailed on the ground that it violates the Federal Constitution."

(III)

The Court below held that the unconstitutionality of either the statute or an administrative order, under the State Constitution, does not concern it, and that it was concerned only with violations of the Federal Constitution.

This appellant, in brief, contends was error.

The view of the Lower Court is correct and is supported by the following authorities:

Cook v. Burnquist, 242 Fed., 321.

Okla. Gas. Co. v. Russell, 261 U. S., 291; 67 L. Ed., 659.

ExParte Buder, 271 U. S., 461.

Ex Parte Williams, reported in *Advance Opinions of June 15, 1928, No. 16, p. 523.*

If the Court should hold that it was its duty to pass upon the questions presented from the standpoint of the State law, then we submit that the actions of the defendants are fully authorized and justified by law.

The position of the appellant is that the statutes of the State of Louisiana do not prohibit the manufacture of gas into carbon black, and do not authorize the Commissioner of Conservation to refuse a permit for the erection of new plants.

Article VI, Section 1 of the Constitution, provides as follows:

> "Section 1. The natural resources of the State shall be protected, conserved and replenished; and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The Department of Conservation shall be directed and controlled by a Commissioner of Conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof."

Pursuant to this constitutional authority the Legislature passed Acts 91 of 1922 and 252 of 1924.

The title of Act 252 of 1924, in part, provides as follows:

> "To define the conditions under which natural gas can be burned into carbon black."

Section 5 provides:

> "The Commissioner of Conservation **may** grant permits for the building of plants to burn natural gas into carbon black under the conditions and provisions of Act 91 of 1922, except that the percentage of the open flow capacity of gas wells

that may be utilized in burning carbon black shall be controlled by this Act when the production of such wells is controlled by this Act and by Act No. 91 of 1922 when the percentage that such wells may produce is controlled by said Act 91 of 1922. Such permits shall only be granted to *bona fide* applicants and which permits shall automatically expire one year after date of issue."

Sub-section 3 of Section 5 provides:

"No permit shall be granted, and the Commissioner of Conservation is without authority to grant a permit for the construction of a new carbon black plant except upon written forms."

A reading of the title, and the sections herein referred to, discloses that the Legislature intended to, and did prohibit the manufacture of natural gas into carbon black, except where the Commissioner of Conservation may issue a permit. If he issues a permit he can only do so under the terms and conditions imposed by Act 97 of 1922, and sub-section 3 of Section 5 of Act 252 of 1924.

This Act, therefore, confers full power upon the Commissioner to refuse to grant a permit for the erection of a new carbon black plant. There is no provision in Act 91 of 1922, or 252 of 1924, which says the Commissioner shall issue a permit to erect a plant. The language is that:

"He may grant permits for the building of plants to burn natural gas into carbon black under the conditions and provisions of Act No. 91 of 1922, except that the percentage of the open flow capacity of gas wells that may be utilized in burning carbon black shall be controlled by this Act and by Act No. 91 of 1922 when the percentage that such wells may

produce is controlled by said Act 91 of 1922. Such permits shall only be granted to *bona fide* applicants and which permits shall automatically expire one year after date of issue."

In this case, Herkness applied for a permit to erect a new carbon black plant. He did not apply for the renewal of an old permit. His application was denied by letter of the Commissioner. The treatment received by him was not different from that accorded other applicants. Their applications were also denied. In fact, no applications for permits to erect new carbon black plants anywhere in the State have been granted by the Commissioner since the passage of Act 252 of 1924.

We, therefore, submit that the authority of the Commissioner to refuse to issue a permit for the erection of a new carbon black plant was not conferred by an order issued and promulgated by the Commission, but was expressly conferred by the Legislature of Louisiana. Being conferred by statute his actions could not, as charged in the complaint, be illegal, beyond and contrary to the statutes of the State.

The authority under which the Commissioner acted, and is acting, was and is derived from a statute and not from an order. This being true we find, from an examination of the complaint, that no attack is made upon Act 252 of 1924, or Section 5 thereof, as being violative of either the Federal or State Constitution. In fact, we think that counsel concede this. (See Par. 8 of brief).

There being no order to attack, and no attack being made upon Act 252 of 1924, the argument of counsel is in-

applicable. Counsel argues that if Act 91 of 1922 and Act 252 of 1924 be construed as delegating to the Commissioner of Conservation the right to refuse permits, then said acts violate the provisions of Article II of the Constitution of Louisiana, prohibiting the delegation of legislative power to the Executive Department.

This question is not raised by the complaint, but if the Court should hold that the unconstitutionality of the statute is at issue, then we submit that the act does not offend against the said article.

It is true that by the authority of Section 1 of Article V of the Constitution the Commissioner of Conservation is made a part of the Executive Department.

It is true that the powers of the Government of the State of Louisiana are divided into three distinct departments—legislative, executive and judicial, and it is true that no person or collection of persons holding office in one of them shall exercise power properly belonging to either of the others, except where expressly permitted by the Constitution. The power conferred by the Legislature upon the Commissioner insofar as the issues in this case are concerned are "expressly directed and permitted by the Constitution of the State."

This authority is found in *Section 1 of Article VI*, which provides:

> "Section 1. The natural resources of the State shall be protected, conserved and replenished;

and for that purpose shall be placed under a Department of Conservation, which is hereby created and established. The Department of Conservation shall be directed and controlled by a Commissioner of Conservation to be appointed as elsewhere provided in this Constitution, who shall have and exercise such authority and power as may be prescribed by law. The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof."

Here we see that the Constitution provides:

"That the Department of Conservation shall be directed and controlled by a Commissioner of Conservation, who shall have and exercise such power and authority as may be prescribed by law."

The action of the Commissioner in this case was prescribed by law, to-wit: Act 252 of 1924. It was not prescribed by an order of the Commission. The power was vested by authority of the Constitution, not contrary to the Constitution.

Art. 296 of the Constitution of 1898 provides:

"The General Assembly shall create for the State, and for each parish, and municipality therein boards of health, and shall define their duties and prescribe the powers thereof.

Pursuant to this constitutional authority the Legislature passed Act 98 of 1906, which authorized the State Board of Health to promulgate a sanitary code, and to make violations thereof a penal offense.

In accordance with this legislative grant the State Board of Health adopted a Sanitary Code. The 37th Section of which provided

> "The use of saccharin in any food product is prohibited."

In the case of *State v. Snyder, 131 An., 146*, the constitutionality of this section was put at issue. The attack made in that case was that the Legislature could not validly delegate to the State Board of Health the power to provide and declare what conduct shall constitute a crime; that the power by which conduct otherwise innocent is made criminal is legislative, and that the legislative power cannot be constitutionally delegated to some subordinate functionary.

The Supreme Court of Louisiana said:

> "The contention would be well founded if it were not Article 296 of the Constitution, reading 'The General Assembly shall create for the State and for each parish and municipality therein boards of health and shall define their duties and prescribe the powers thereof.'"

The Court further said:

> "Here the Legislature is authorized to prescribe the powers of the Board of Health. This can only mean to delegate to the Board of Health such power as may be deemed necessary for efficiently carrying out the purposes for which a board of health is created and the power most obviously necessary in such a case is to make health regulations that shall have the force of laws."
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> *State v. Snyder, 131 An., 146.*

The case is still the law and it has never been overruled.

In the present case the Constitution says "the Commission shall have and exercise such authority and power as may be prescribed by law." This power is conferred by the Legislature.

In support of their contention counsel cites the case of *State v. Billot, 154 La., 402.* This case is not authority for their position. In addition, it was overruled by the case of the *State v. Thrift Oil & Gas Co., 162 La., 166.* It is true that a rehearing was granted in this case and that it was decided on other grounds on rehearing. However, it is clear that the Court will no longer follow it. The Court held that it was directly in conflict with the cases of *United States v. Grimaud, 220 U. S., 506, 55 L. Ed., 563,* and *Fred Light v. United States, 220 U. S., p. 523, 55 L. Ed., 570.*

In these cases this Court said:

> "The Secretary of Agriculture could not make rules and regulations for any and every purpose. As to those here involved they all relate to matters clearly indicated and authorized by Congress. A violation of reasonable rules, regulating the use and occupancy of the property is made a crime not by the Secretary but by Congress. The statute, not the Secretary, fixes the penalty. The Secretary did not exercise the legislative power by declaring the penalty or by fixing the punishment. The punishment is imposed by the act itself."

In the present case the manufacturing of natural gas into carbon black without a permit, or the erection of

a new carbon plant without a permit, is made a crime not by order of the Conservation Commission but solely by the statute itself. The penalty imposed for so doing is provided not by order of the Commissioner, but by the statute itself. No power is delegated to the Commissioner to impose penalties nor to prosecute. This power is conferred only on the authorized officers.

We, therefore, submit that the contention of appellant upon this point is without merit.

(IV)

As we understand the contention of relator, it is that whether the unjust discrimination complained of is caused by an unconstitutional executive order or an unconstitutional legislative act, relator urges upon the Court that he is not by the State of Louisiana given the equal protection of the law, because the result of the executive order or legislative act is to permit those already engaged in the manufacture of carbon black before relator's application for a permit, to continue to make carbon black in that State and to deny to all others and, amongst them, relator himself, the right to make carbon black.

That in so doing a discrimination has been made between relator and those already in the business is not a matter of dispute.

But that such discrimination is an unjust and arbitrary discrimination without adequate relation to the public welfare of the State of Louisiana and a discrimination

that the State cannot in the exercise of its police power make the burden rest upon relator to show.

In considering such question it should be kept in mind that the facts set forth in the State's sworn return must be taken as correct and such facts are, it is evident, mostly facts that are within the common knowledge of all men.

They are, that the conservation of the supply of oil and natural gas is a matter of the utmost importance to the welfare of the individual states and of the entire nation. That the owner of land from which natural gas is taken has not a full ownership in such gas until it is reduced to his possession.

That until such possession is had, the State has the right of control of natural gas.

That the greatest economic waster of the nation's supply of natural gas is the carbon black manufacturer.

That a State can absolutely prohibit the manufacture of carbon black. *Walls v. Midland Carbon Company, 254 U. S., 300.*

That since 1924 no permits have been issued by the State of Louisiana for the building of carbon black plants and the product of the extant plants is being gradually reduced by the efforts of the legislative and executive departments of the State.

Answer of State, paragraph 36, R. p. 23.

Appellant's brief, pages 3 and 5.

That in 1924 the Commissioner of Conservation publicly declared that he would issue no further permits and that then the policy of the State to gradually suppress the business with as little injury to those who had already invested in it, that the welfare of the State would permit, was fixed. That in 1925 in the face of this publicly declared policy, the present complainant, a citizen of Pennsylvania, came into the State of Louisiana, and with his eyes open to these facts, invested some $200,000.00 in property in this State, which he, in Article 6 of his bill, declares "is without substantial value except for the purpose of producing natural gas and manufacturing it into carbon black."

It is to be noted that he then attempts to veneer the inequitable facts of his case by stating that the object of the Commissioner was not the protection of the material well-being of the people of the State, as is clearly shown by a recital of the above undisputed facts, but was to establish a monopoly in those who have permits and who are at present manufacturing carbon black. (Bill of Complaint, Article 14, T. 5).

And it is well to also note that if such a distinction as has been made by the Commissioner is an unconstitutional classification under the 14th Amendment or establishes a monopoly under the Constitution and statutes of Louisiana, all classifications that are made by any State in any issuance of permits are contrary to the 14th Amendment and all systems of issuance of permits by States are the establishments of monopolies by such systems, and no distinction under their police powers can be made by the States under any circumstances whatsoever.

It is almost needless to cite authorities to maintain the position that that section of the 14th Amendment which complainant has invoked has always very properly been construed to protect and to protect alone, the property that a complainant owned previous to the enactment of the legislation that complainant avers makes unjust discrimination against him and not property that he acquired after the passage of such legislation.

In addition we beg to call the Court's attention to the fact that this is not a case where relator has been refused a permit and permits are being granted to others similarly situated, but this is a case where relator's permit has been refused and permits have been refused to all others who have made application for permits. The unjust discrimination complained of by relator, then, as a matter of substantive law, is a discrimination whereby the State of Louisiana declares that those who owned carbon black plants previous to the passage of the State's law and the establishment of its executive policy, may continue in the business subject to a gradual reduction of production and an ultimate suppression and that no further permits to do such business will be granted, is such a discrimination that cannot be made in the interest of the welfare of the State, imposed in the legitimate exercise of its police powers and that it works an oppressive injustice to those not already engaged in the business but who desire to embark in it.

As this Court said in *Waugh v. University of Mississippi, 237 U. S., 589*, a case wherein the constitutionality of a statute of Mississippi forbidding Greek letter frater-

nities in the State University was attacked as making an unjust discrimination in that the statute did not apply to students who had already entered, "This order is assailed as making a clear discrimination between the 'ins' and 'outs.'" The Court said the discrimination was based on an obvious and rational distinction. The obvious and rational distinction is equally clear here.

In *Watson v. Maryland, 218 U. S., 173,* where the constitutionality of the medical registration act was attacked because it exempted certain physicians from registration, the Court said:

> "Classification will not render a state police statute unconstitutional as denying equal protection of the law so long as there is a reasonable basis for such classification; nor will exceptions of specified classes render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted class. Williams v. Arkansas, 217 U. S., 79."

Is there not here clearly a fair reason that requires the excepted classes to be excluded? Chief Justice Taft recently said that the 14th Amendment in as far as its provisions now here invoked are concerned, did no more than require the law of fair play.

Would it have been fair play for the State of Louisiana to have suddenly suppressed and stamped out the business and plants of those already engaged in the making of carbon black? Is it not more in accord with a right idea

of fair play, that the State should say we will grant no more permits to manufacture carbon black but those who are already engaged in the business shall gradually stop making carbon black. They shall have a chance to get their money back that they have invested in the business. Another policy would have been confiscation—although lawful confiscation.

(V)

Appellant seeks to enjoin the Conservation Commissioner and the Attorney General (1) from interfering with the erection of a carbon black plant and (2) from instituting any suit, civil or criminal, to penalize him for the erection of same without a permit.

Act 252 of 1924 is the only Act referred to by complainant which imposes a penalty. There is no order imposing a penalty. If a fine or sentence is ever imposed upon appellant it must be imposed under Act 252 of 1924. This Act is solely and purely a criminal statute.

It must be remembered that appellant has not appealed to any Court to compel the issuance of a permit. It must be remembered that neither the Attorney General, nor any District Attorney has filed, or instituted, either civil of criminal action. Indeed, no civil action is allowed under the statute except that after a certain number of convictions a suit could be filed to forfeit his right to do business which could only be done where the violations are

willful, and then only where the second violation succeeds a prior conviction, and the third violation succeeds a second conviction. The action is, therefore, clearly to enjoin and restrain the enforcement of a criminal statute of the State.

The general rule is that Courts of equity will not interfere to prevent the enforcement of a criminal statute, even though unconstitutional. *Packard v. Banton, 264 U. S., 140; In re. Sawyer; 124 U. S., 200; 189 U. S., 207.*

In brief, appellant contends that *Ex Parte Young, 209 U. S., 123*, exactly fits this case. We think that this contention is answered by this Court in the later case of *Fenner v. Boykin, 70 Law Ed., 927*, where the Court said:

> "Ex parte Young, 209 U. S., 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of Federal questions. An intolerable condition would arise if, whenever about to be charged

with violating a state law, one were permitted freely to contest its validity by an original proceeding in some Federal court." *266 U. S., 497.*

"The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional." *Packard v. Banton, 264 U. S., 140; In re Sawyer, 124 U. S., 200; 189 U. S., 207.*

In re Amalgamated Oil & Gas Corporation v. City and County of San Francisco, 263 Fed., 217, the Court said:

"It will thus be seen that what plaintiff really is complaining of is, not an attempt or threat to enforce, as against it, an unconstitutional or otherwise invalid regulation, but a mistaken or unwarranted effort to subject it to a regulation which, it claims, has no application to the subject matter involved, and the substance of its contention is that the threats of the defendant to subject it, and those deriving their right from it, to prosecution under a law which does not apply to it, constitutes an invasion of its property rights which equity may restrain. In this, plaintiff is mistaken. Its position amounts to no more than that equity may competently intervene to restrain threatened criminal proceedings for the alleged violation of a perfectly valid and constitutional law, merely because such proceedings are based upon what is claimed to be a misapplication of its terms to an act which does not in fact fall within its denunciation, and will thereby work injury to plaintiff's business. Equity possesses no such jurisdiction. The exceptional instances in which a court of equity is justified in interposing its restraining arm to prevent criminal prosecutions are fully and elaborately considered In Re Sawyer, 124 U. S., 200, L. Ed., 402; Davis and

Farnham v. Los Angles, etc., 189 U. S., 207, 47 L. Ed., 778, and Dobbins v. Los Angeles, 195 U. S., 223, 49 L. Ed, 169, and need not be restated. It is sufficient to say that within the principles there announced, it is essential, as a predicate for the relief here sought, that it appear, not only that the ordinance involved is unconstitutional, but that its enforcement will result in a direct invasion of property rights. Neither of those elements are presented in the present bill, since it clearly appears that the injury or loss to the plaintiff's business or rights of property would be simply such as would incidentally flow from the arrest and prosecution threatened. Where the ordinance or law is, as here, clearly constitutional, but a party conceives himself to be unjustly harassed by prosecution or threats of prosecution, his remedy is at law, by a defense in the criminal court where all proper defenses will be open to him; and it adds nothing to the bill making for equitable relief that there are threats of successive or repeated prosecution. Sullivan v. San Francisco Gas & Electric Co., 148 Cal., 381, 83 Pac., 156.

"Nor do the averments that the device constitutes 'a properly constructed kerosine stove,' and as to the flash test of the oil used therein, evidently intended to bring the plaintiff's burner within the exception of the ordinance, add anything to the bill. They tend, if anything, to emphasize the fact that plaintiff has mistaken its remedy. If true, their effect is merely to show that plaintiff is entitled to a permit or license to make and sell its burner under the very terms of the ordinance. If this be so, its remedy is to apply for a permit, and, if unjustly refused, to compel its issuance by a proper proceeding at law, and there is no averment that any such steps have ever been taken.

"Let the restraining order be vacated, a temporary injunction denied, and the motion to dismiss the bill granted."

In the *Pacific States Company v. City and County of San Francisco*, decided on July 26, 1909, reported in the *171 Fed., 727*, the Court said:

> "As to the second objection urged, I do not regard the allegations of unfair and arbitrary action of the city authorities in administering the ordinance, upon which this objection is based, as adding anything of substance to the bill in making a case for equitable relief. The ordinance being a valid regulation, however flagrantly partial its administration may be, the remedy is not in equity to restrain the city authorities from enforcing it, but at law to compel the issuance of a permit if the facts warrant it."

In the *238 Fed., 619*, in case of *Central Consumers' Company of New Jersey v. Austin*, the Court said:

> "These cases show that, in Federal Courts of Equity, the exception to want of jurisdiction to enjoin criminal proceedings in State Courts has the additional limitation that the criminal proceedings must have been instituted to enforce a State statute or municipal ordinance alleged to be in conflict with the Federal Constitution and invalid. The reason for the additional limitation is manifest. If the State officers sought to be enjoined are proceeding under a valid statute of the State, they represent the State, and a suit to enjoin them is a suit against the State within the meaning of the Eleventh Amendment to the Constitution. On the other hand, if the proceedings are to enforce an unconstitutional statute or ordinance, the persons seeking to enforce it on behalf of the State, are not considered as representing the State, but act as individual wrongdoers, and a suit to enjoin them is therefore held not to be a suit against the State."

The Court further said

"In this case, for the purposes of this motion, it is conceded that the State law was valid. The complaint was that the State solicitor was wrongfully construing it to apply to a nonalcoholic beverage. The solicitor was the law officer of the State, and a suit to enjoin him from so doing is a suit against the State. This is nonetheless true because he is charged with having misconstrued the valid statute. The interpretation of the criminal statutes of the State are matters within the exclusive criminal jurisdiction, orignal and appellate; certainly so far as it concerns the jurisdiction of Federal Equity Courts. The Federal Courts follow the interpreta - tion of the State Courts of last resort in such matters.

"If Federal Courts of Equity could interfere with State Courts of competent criminal jurisdiction, or prevent the law officers of the State from enforcing its criminal law, because of anticipated errors of law in the administration of such laws, it is clear that they could equally interfere therewith or prevent such officers from performing their duties to the State, because of anticipated mistakes in decisions of fact. The contention in this case is that the statute does not cover non-alcoholic beverages, and that ambrosia is indisputably a non-alcoholic beverage, but that the State authorities will construe the law to include it. If the statute is conceded to be valid, a Federal Court of Equity has no more right to interfere with the enforcement of the State's criminal laws by its law officers through its Courts, because of anticipated errors in the construction of the statute by the Judge, than it would have to interfere because of anticipated errors in the decisions of fact by a jury.

"Such a ground of Federal equitable interference with the enforcement of the criminal laws

of a State would not be contended for. An interference because of either ground would be an invasion of the jurisdiction of a Court of competent and concurrent, if not exclusive, jurisdiction. Nor can it be assumed that the State Courts will commit error in either respect. The presumption is to the contrary. If the construction given the statute by the law officer of the State is erroneous, it will be presumed that the State Courts will not follow it. Indeed, the correctness of the construction depends entirely upon the decision of the State Court of last resort.

"It is to be presumed that the plaintiff can make good any meritorious defense, either of law or fact, by presenting it in the State Court. Mere apprehension that it may be otherwise confers no jurisdiction on the Federal Courts. If it did, the Federal Equity Courts would draw to themselves full jurisdiction of the enforcement of the criminal laws of the State in all cases, and exercise supervisory jurisdiction over the State Courts in criminal matters. No such principle obtains. It is only when State law officers cease to be such, because acting under unconstitutional State enactments, that Federal Courts have power to restrain their acts, done under color of office, but not by authority of it."

Hoffman v. McElligott, 259 Fed., 525.

If the statute is valid, as is contended by plaintiff, and if the law does not authorize the Commissioner to refuse a permit, then the plaintiff has a remedy by mandamus.

If the construction placed upon the statute by the Attorney General is wrong, and should he, or any District Attorney, proceed to institute a prosecution, then plaintiff can make good any meritorious defense by presenting it

in the State Court. He should first set up his defense in the State Courts, even though this involves a challenge of the validity of the Act. If he is convicted he has an appeal to the State Court and to this Court by review.

We think it clear, therefore, that appellant is not entitled to injunctive relief.

(VI)

If this statute is valid, as conceded by plaintiff, and the Commissioner was without right or authority to refuse the issuance of a permit, then he has a plain, adequate and complete remedy by mandamus.

In the *Pacific States Company v. City and County of San Francisco, 171 Fed., 727*, the Court said:

> "As to the second objection urged, I do not regard the allegations of unfair and arbitrary action of the city authorities in administering the ordinance, upon which the objection is based, as adding anything of substance to the bill in making a case for equitable relief. The ordinance being a valid regulation, however flagrantly partial its administration may be, the remedy is not in equity to restrain the city authorities from enforcing it, but at law to compel the issuance of a permit if the facts warrant it."

This case holds:

> "That where city authorities arbitrarily refuse to grant complainant a blasting permit under a valid city ordinance prohibiting blasting in a city without such permit, complainant's remedy was at law to compel the issuing of a permit, if the facts

warrant it, and not in equity to restrain the city authorities from enforcing the ordinance."

At any rate, it is clear that appellant is not entitled to injunctive relief.

CONCLUSION.

The decree of the District Court should be affirmed.

Respectfully submitted,

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Of Counsel:
EDWARD RIGHTOR.